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CRIMINAL BREACH OF TRUST AND CORPORATE MISMANAGEMENT

*Orvill C. Snyder**

In the February, 1937, issue of this Journal,[1] an article by the present writer appeared, of which the introduction is as follows:

> "America's pride has always been an unexampled material progress which has opened the door of opportunity and spread the good things of life in the midst of her people more widely than has occurred in any other country at any time. According to the national faith, it is the industry and thrift of the private citizen that generates this material progress. Moreover, it is the practice of these two soverign virtues that develops the steadiness of character, self-reliance, and alertness upon which the whole process of national and individual advancement, both material and ideal, depends.
>
> "For the attainment of success by the venerated formula of industry and thrift, three conditions must exist: a chance to work, returns from that work leaving a margin above need for savings, and security of those savings. The first two of these conditions do not provide our subject. In a land of opportunity, it ought to be possible to assume that they exist; and, more pertinently, they make little sense without the third, since the efficacy of working and saving depends upon the security of accumulations. Security of savings is, therefore, the central factor in individual success by means of industry and

*LL.B., LL.M., Columbus College of Law; LL.M., Northwestern Univ.; professor of law, Brooklyn Law School, St. Lawrence Univ.; member of Ohio bar; former dean, The Columbus College of Law; author, *The Influence of Equity Principles in Embezzlement Prosecutions* (1936) 30 ILL. L. REV. 995; *Word Magic and the Embezzlement of Real Property* (1937) 28 J. CRIM. L. 164; *The Corporate Person and the Fourteenth Amendment* (1938) 8 BROOKLYN L. REV. 4; and other articles in legal periodicals.

[1]Snyder, *Safeguarding the People's Savings—A Challenge to the Law* (1937) 9 MISS. L. J. 257; reprinted in (Dec. 1938) THE LAWYER.

thrift. And it is of equal consequence as a matter of public policy."

The article went on to show that "consideration of the security of savings can be confined to the security of savings in corporate forms and yet embrace the controlling part of the whole subject. The saver's confidence is placed in corporations, that is, in substance in those who control and manage corporations. His safety depends on how well they can and do acquit themselves of the trust." The suggestion then was made that a study might well be undertaken in which persistent abuses in corporate management are laid alongside the judicially elaborated concepts of embezzlement. This suggestion was based upon the fact that American economic history reveals a recurring factor of corporate "mismanagement, deliberate and in the face of danger signals, characterized by egotism and desire for personal gain regardless of cost to the beneficiaries of management's trust"; and upon the further fact that, since "certain fundamental principles of morality should be publicly and notoriously characterized by the civil community as inviolable by attaching to actions which are contrary thereto an impressive mark of disapprobation", it is peculiarly the function of the criminal law to perform the task of moral vindication.

The envisaged study has been completed[2] and those parts of it in which the concepts of criminal breach of trust, as developed and applied by the process of judicial inclusion and exclusion, are compared with persistent forms of corporate mismanagement, follow. Before they are entered upon, some later reflections may be mentioned.

Recent events confirm the belief that the issue before this country is, and has been, one of making corporations work. The electoral majorities of 1932, 1934, and 1936, were largely the result of the industrious and thrifty middle classes changing their allegiance. They had worked and had saved and had seen their savings jeopardized and lost by excesses in corporate management. The election of 1938 shows uneasiness on the part of these same industrious and thrifty classes about their savings, this time from deficit financing and pre-occupation with the under-privileged "third". While it is fashionable today to blame "politics", still, with the apprehended perils of political hampering properly removed, the fact remains that the middle classes who do work and save are the "tower of strength" in a system of private property;

[2]The study has been approved by the Graduate Committee of the Law School of Northwestern University and is on file there.

that these classes can achieve "the more abundant life" only if their savings are secure; that they must, in preponderant measure, entrust those savings to corporations; and hence that their security depends upon how well those who control and manage corporations discharge their trust.

Those who control and manage corporations, whether they wish it or not, are in a position of leadership. And leadership is "properly, if he knew it, the prime want of man."[3] Man does know it, when leadership fails; for he exacts a terrible penalty of those who encourage or permit him to trust them, when they desert him. Followers may be faint-hearted or disloyal, but leaders never. Leadership must lead; it cannot pity itself, because of the price it must pay; "sphinx-questions" it must answer or die; its type is the master who brings in his ship or goes down on the bridge, who cannot put off with his own effects and leave his crew to sink. Leadership cannot keep its eyes fixed upon its own gains and pleasures; it must be diligent about keeping its shop before it can expect its shop to keep it.[4] The Greeks too had words for it, as witnesses what Socrates said to Thrasymachus:[5] ". . . . no physician, in so far as he is a physician, considers his own good in what he prescribes, but the good of his patient; for the true physician is also a ruler having the human body as a subject, and is not a mere money-maker"; the ". . . . pilot and ruler will provide and prescribe for the interest of the sailor who is under him and not for his own or the ruler's interest"; and ". . . . there is no one in any rule who, in so far as he is a ruler, considers or enjoins what is for his own interest, but always what is for the interest of his subject or suitable to his art . . . ."

Some years ago, the present writer prepared a series of articles on "The Frontier of the Law," in which it was said:

> "We have witnessed the failures of many self-constituted prophets of novel and nebulous better things. Let the legal profession claim its heritage, the place it had in the days of our fathers, in the forefront of seasoned thought on human conduct. Let it move forth to its true destiny not proclaiming vague Utopias but advancing courageously along the sure principles of just human relations painfully learned through a thousand years."[6]

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[3] CARLYLE, THE FRENCH REVOLUTION (1847) bk. I, c. 2.

[4] *Cf.* Franklin, *The Way to Wealth*: "Keep thy Shop, and thy Shop will keep thee."

[5] THE REPUBLIC OF PLATO (3d ed. Jowett trans. 1888).

[6] (Mar. 1933) 10 THE LAW STUDENT, No. 3, p. 13.

In the field of the corporation has lain opportunities for the legal mind and here lies another opportunity, which involves no departure from traditional ideals or established methods. By an "impressive mark of disapprobation" on desertion of trust, the law can vindicate the virtues of industry and thrift, upon which the system of individual enterprise and private property is founded.[7]

The study referred to above was written and submitted under the title "Criminal Breach of Trust and Corporate Mismanagement." The task of the study was the application of judicially approved conceptions of criminal breach of trust to some constantly recurring forms of corporate mismanagement, or, perhaps, more accurately, the comparison of some typical factual situations of persistent forms of mismanagement with factual situations which have been judicially subsumed under the general rubric "embezzlement".[8] In doing the task assumed, it was necessary (1) to achieve, from the judicial decisions of the different jurisdictions of the Union, general ideas of embezzlement which are "uniform and stable" *in the judicial process* "under the numerous and varying statutory terms"; (2) to remark peculiarities occasioned by introduction of the corporate *persona*; (3) to specify factual situations which are typical of demonstrably persistent forms of corporate mismanagement; (4) to compare these typical situations with factual situations judicially determined to constitute embezzlement; and (5) to answer objections.

I. The Act of Embezzlement

This part of the study is omitted but a short summary is given. More than two hundred cases from the courts of the United States and from the courts of some forty States were analyzed. The different words in the various statutes applicable to criminal breach of trust, such as "embezzlement", "abstraction", and "misapplication", were considered and this conclusion reached: By and large, it seems safe to say that the same results are attained under more than one word in the same statute, and under different words in different statutes. This result is understandable on the view that those features of fraudulent conversion, which courts regard as significant, are common to these various criminal breaches of trust. The following also were considered:

[7]Witness what was done for life insurance management by the reports of Elizur Wright and of the Armstrong Committee. See Snyder, *supra* n. 1 at 273.

[8]Embezzlement is the typical criminal breach of trust. Misapplication and abstraction are treated as varieties of embezzlement including the same essentials of fraudulent conversion.

(1) The fiduciaries included in the statutes. (2) What is required for the fiduciary to have "possession", "custody", "charge", "access", or "control" of the "property" involved. (3) What is included in "property" which may be entrusted to the "possession", "custody", "charge", "access", or "control" of the fiduciary. (4) What conduct of the fiduciary constitutes "conversion" of the "property" entrusted to his "possession", "custody", "charge", "access", or "control". (5) What additional aspects of the fiduciary's conduct make that "conversion" criminal or "fraudulent".

After a detailed consideration of all these matters a summary was attempted. It was concluded that in studying a factual situation to determine whether or not it lies within the area of embezzlement, the following considerations must be kept in mind:

(1) There must be a fiduciary relation.

(2) This fiduciary relation must embrace the entrusting of 'property'[9] of the *principal* to the *agent.*

(3) The *agent* must by active conduct, and not by mere failure to act, work actual loss or risk of actual loss to the factual interests of the *principal.*[10]

(4) This causal conduct of the *agent* must be of such nature that it can be analogized to the servant's withdrawing and going away with a chattel.

(5) In working out doubtful points, the courts keep attention fixed upon the "due execution of the trust". This practice makes the following aspects paramount: What is the purpose for which

[9]The term "property" in single quotation marks, thus 'property', is used as a general term to denote all the varieties which may be involved and to keep constantly in mind that the term is used in this broad sense instead of any narrow and restricted sense. The term "agent" in italics is used as a general term to denote fiduciaries, who may be technical agents, servants, trustees, bailees, directors, officers, *etc.* The term "principal" in italics is used as a general term to denote beneficiaries of the trust, who may be technical principals, masters, *cestuis*, bailors, stockholders, *etc.* The term "fraudulent conversion" is used as synonymous with "embezzlement" and both often include technical misapplication or abstraction.

[10]"There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular defendant." Henderson v. State, 55 Tex. Cr. 640, 117 S. W. 825 (1909).

Observe that the essence of value, particularly where 'property' is entrusted by the 'owner' to another, consists in the expectations of the 'owner'. Loss, conversion to converter's own use, and fraudulent intent also find their meaning in the defeat of these expectations. Conversion to any use other than to the use of the *principal* is nothing but the defeat of his expectations. The important aspect of fraudulent intent is not any dispute over its subjective or objective character, nor over whether or not subjective intent can be known, but is its consequences which defeat the expectations of the *principal.*

the fiduciary relation was created? Just what factual ends, interests, or expectations of the *principal* are there? The duties imposed upon the *agent* to make active exertions to realize these ends are primary; his duties to refrain from other kinds of conduct flow therefrom. Merely technical breaches may be disregarded if the factual interests of the *principal* are clearly conserved.

(6) Exploration of actual loss or risk of actual loss to the factual interests of the *principal*, especially in those cases where the agent was authorized to incur reasonable risks, is made mostly by means of the rule that the conduct of the *agent* must manifest an intent to defraud.

It is now possible to proceed to the application of these ideas—which, in the judicial process, are substantially uniform and stable under the numerous and varying statutory terms—to some constantly recurring problems of corporate mismanagement.

II. Aspects of Fraudulent Conversion Peculiar to the Corporate Form of Business Organization

There can be no doubt of the proposition that those who have possession, charge, access, control, or management[11] of the 'property' of corporations are fiduciaries. If any person, to whom corporate 'property' comes, is an employee of the corporate 'owner', he occupies the relation of agent or servant and is subject to the fiduciary obligations of these relations. Directors are fiduciaries;[12] and, although most of the cases relate to directors,[13] other officers too are clearly fiduciaries.[14] Thus, one of the requirements of the embezzlement statutes is fulfilled.

1. 'Possession' of Corporate 'Property' and Directors

Directors individually do not have 'possession' of a corporation's 'property'; their 'possession' is that of the board as a whole. Since, under the embezzlement statutes, defendants must have 'possession' of the 'property' which they convert, it is necessary to inquire how a director individually may sustain the necessary

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[11]Hereafter the term "possession" in single quotation marks, thus 'possession', will be used to refer generally to the relation of possession, charge, access, control, or management.

[12]Ballantine, Corporations (1927) c. 10; 3 Fletcher, Cyclopedia of the Law of Private Corporations (1920) c. 11, § 838. Secondary authorities will be used largely to indicate the broad features of general corporation law in a background of which the principles of fraudulent conversion must be considered with relation to corporate mismanagement.

[13]3 Fletcher, *op. cit. supra* note 12, § 991.

[14]Ballantine, *loc. cit. supra* note 12; 3 Fletcher, *op. cit. supra* note 12, §§ 838, 991.

relation. Then too, it is known that persons who are not employees, officers, or directors sometimes take a hand in the mishandling of corporate 'property'; and it, therefore, is pertinent to observe how they may convert 'property' which must be in the 'possession' of the converter.

The matter can best be approached by means of a specific case. In *State v. Holen*,[15] two defendants were directors of a bank, one of them being cashier also. They were charged with embezzlement through the payment of a dividend, which they had procured the board to declare by putting worthless paper into the assets of the bank and thereby showing a supposed surplus. The defendants received their proportionate share as stockholders and were charged with embezzling the amount thus received. It was held that the facts did not constitute the offense; for the reason that the board as a whole had 'possession' of the funds of the bank and the defendants, since they were not a majority, could not declare the dividend. The opinion indicates that a majority, acting together and having knowledge that there are no surplus funds with which to pay the dividend, can commit embezzlement by means of a vote by the board. The difficulty in the case was that only the two defendants had knowledge of the falsity of the account which was used as the basis of the board's action.[16] There seems to be no question that a board of directors has as a unit the requisite 'possession' or that an act of the majority (in a duly called meeting) is an act of the board.[17]

The indictment in the *Holen* case might have been drafted so as to cover the acts of the defendants. Doubtless, the cashier had the necessary 'possession'[18] of the funds of the bank. He could have been indicted for embezzling the funds paid out by procuring their dissipation from his 'possession' through the innocent acts

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[15]63 S. D. 151, 257 N. W. 108 (1934).

[16]Taylor v. Commonwealth, 119 Ky. 731, 75 S. W. 244 (1903), quoted at length and relied upon in State v. Holen, 63 S. D. 151, 257 N. W. 108 (1934), states the same view as to the majority committing embezzlement through the device of a dividend, when the majority acts together with full knowledge. People v. Lay, 193 Mich. 17, 476, 159 N. W. 299, 160 N. W. 467 (1916), states the same rule as to acts by the board with respect to excessive salaries voted by a majority. United States v. Britton, 108 U. S. 199 (1883) and McNary v. State, 128 Ohio St. 497, 191 N. E. 733 (1934) do not in any way contradict this view, but merely hold that voting dividends without funds was, by the applicable statutes, specifically brought under other sections than the embezzlement or misapplication sections.

[17]State v. Holen, Taylor v. Commonwealth, People v. Lay, all *supra* note 16.

[18]Which can be "concurrent". United States v. Breese, 131 Fed. 915, (W. D. N. C. 1904); and see Reeves v. State, 95 Ala. 31, 11 So. 158 (1891); Walter v. States, 1 N. E. (2d) 127 (Sup. Ct. Ind. 1936); People v. Sherman, 133 N. Y. 349, 31 N. E. 107 (1892).

of the other members of the board, whom he misled.[19] His collaborator, who was but an individual director and did not himself have the requisite 'possession', was an aider and abetter.[20] In fact, the aider and abetter need not have been an officer or director at all.[21] Nor need the defendants themselves have received any of the funds paid out.[22]

2. 'Possession' of Corporate 'Property' and Those in "Control"

There is much authority extending the fiduciary concept to persons who in fact exercise "control", especially where these persons are also directors or officers or a compact group of controlling stockholders.[23] And there is some slight intimation that the persons exercising "control" are fiduciaries, even though they have no formal legal relation such as that of directors, officers, or stockholders, but are merely creditors or are otherwise in position

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[19]Embezzlement may be committed through the innocent acts of other persons which the defendant causes to be done. United States v. Fish, 24 Fed. 585 (C. C. S. D. N. Y. 1885); *Ex parte* Hedley, 31 Cal. 109 (1866); People v. Canadian Fur Trappers Corp., 248 N. Y. 159, 161 N. E. 455 (1928); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911). The person causing the innocent acts must himself, of course, have the necessary 'possession'. If a director, who is not an officer in any other capacity, should induce the board to act, it seems impossible to say that he embezzled 'property' in his 'possession'. This, doubtless, is a far fetched case; usually he would have to procure the collaboration of some executive officer.

[20]Evans v. United States, 153 U. S. 584 (1893) (a director aiding and abetting a cashier); Coffin v. United States 162 U. S. 664 (1895) (a customer aiding and abetting a president); Robinson v. United States, 30 F. (2d) 25 (C. C. A. 6th, 1929) (customer aiding and abetting a vice-president); Olmstead v. United States, 29 F. (2d) 239 (C. C. A. 9th, 1928) *cert. denied* 279 U. S. 849 (1929) (a large stockholder aiding and abetting a president); State v. Linden, 171 Wash. 92, 17 P. (2d) 635 (1932) (one officer aiding and abetting another).

[21]Coffin v. United States, Robinson v. United States, Olmstead v. United States, all *supra* note 20.

[22]Coffin v. United States, 162 U. S. 664 (1895); United States v. Fish, 24 Fed. 585 (C. C. S. D. N. Y. 1885); State v. Meininger, 306 Mo. 675, 268 S. W. 71 (1925); Hitchcock v. State, 47 Ohio App. 90, 190 N. E. 773 (1933); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911). In the light of the rulings that conversion to the use of the defendant means conversion to the use of any other persons than the *principal*, it seems that the defendants could be held for embezzling the entire dividend and not just the part received by them.

[23]"Control" is discussed at length in BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) bk. II, c. IV; and see BALLANTINE, *op. cit. supra* note 12, §§ 588, 596, 764, 788; 3 FETCHER, *op. cit. supra* note 12, c. 58, §§ 5810, 5811, 5812; Southern Pacific Co. v. Bogart, 250 U. S. 483 (1919); Union Pac. R. R. v. Frank, 226 Fed. 906 (C. C. A. 8th, 1915); Brewer v. Proprietor of the Boston Theatre, 104 Mass. 378 (1870); Booth v. Beattie, 95 N. J. Eq. 776, 118 Atl. 357 (1924); Young v. Columbia Land & Investment Co., 53 Ore. 438, 99 Pac. 936 (1909).

where they, as a matter of fact, do exercise "control".[24] It oftentimes would be impossible to bring these persons under the terms of the embezzlement statutes; for the reason that the words therein designate only other specific kinds of fiduciary. However, they may be within the compass of such statutes as contain designations of "any person entrusted" or "other person acting in a fiduciary capacity".[25] Moreover, persons in "control", doubtless in most instances, must act through others who are of designated fiduciary classes.[26] In embezzlement, mismanagement in general is not dealt with but that form of mismanagement which consists in withdrawing 'property' already acquired. Since 'property' already acquired by a corporation can be disposed of only by the directors, officers, or agents having 'possession', if those exercising "control" want to withdraw it, they must procure the affirmative action of the requisite authorized person or persons. In such a situation, when the directors, officers, or agents having 'possession' perform the acts of withdrawing the 'property' contrary to corporate purposes, those exercising "control" who induce or require such acts to be performed are doubtless aiders and abettors.[27] In this con-

[24]BERLE AND MEANS, *op. cit. supra* note 23, at 240; 15 FLETCHER, *op. cit. supra* note 12, c. 63, § 7428, citing National Bank of Commerce in Denver v. Allen, 90 Fed. 545 (C. C. A. 8th, 1898), at 551 of which the following appears: "It is doubtless true, as has been suggested, that a large creditor of a corporation or of an individual, by virtue of being such, sometimes has such an influence over his debtor as enables him to control his actions in many ways; but this is a moral power, incident to the situation, which the law permits a creditor to exercise for his own benefit and advantage even at the expense of other creditors, *provided that he does not direct the doing of the acts that are illegal or fraudulent.*" (Italics mine).

[25]See, for instance, CAL. PENAL CODE (Deering 1931) §§ 484, 503; Ill. State Bar Stats. (1935) c. 38, ¶ 194.

[26]Reaching those who exercise "control" through those whom they must control to effectuate their ends seems to be the usual judicial method. See BERLE AND MEANS, *op. cit. supra* note 23, at 239. Since officers and directors must "withdraw" the 'property' and since their fraudulent acts cannot be authorized or ratified by dominating stockholders nor can the officer and directors divest themselves of their duties as such, it seems that responsibility as aiders and abettors might obviate that difficulty which lies "in the fact that the remedy afforded to the independent shareholder is hazardous in the extreme." See BERLE AND MEANS, *op. cit. supra* note 23, at 240. In cases of gross malversation by those exercising "control", it does not appear likely that the executive officers who "withdraw" the property or execute the designs can be innocent of knowledge that their acts are fraudulent; and thus they would have the necessary "guilty knowledge" to be principals and those who knowingly induced or coerced them would then be aiders and abettors.

[27]Note the following in which in effect the same line of reasoning is followed in a civil case: "The defendant Bell was Acoustic's agent in the original negotiations with Reynolds, and it is urged by the plaintiff that as such agent he was a fiduciary precluded from making profits out of the subject-matter of his agency. On his behalf it is contended that his agency was ended when he delivered to Acoustic the written offer of Reynolds & Co. and that his participation in the Biddle syndicate was not by virtue of his former agency relationship nor because of any information he had obtained as Acoustic agent; that

nection, it is to be remembered that those exercising "control" through stock ownership cannot authorize in advance or ratify acts of the board of directors or of an officer or agent which, otherwise and without such authority or ratification, are fraudulent, so as to make those acts innocent,[28] any more than the board of directors can authorize such acts by officers or agents.[29] The principle is expressed by the Supreme Court of California in the words that "it might be seriously questioned whether an authorization or ratification by the board of such acts would not have resulted in involving the directors rather than in excusing the officers."[30] since directors cannot divest themselves, or be divested, of their fiduciary obligations by custom, practice, or agreement,[31] those who act with or through them cannot escape sharing the obligations of their fiduciary duties.

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he stands like any stranger to whom the syndicate might have offered a participation. But, even if the fact of his agency be disregarded, we think there is an applicable principle which requires him to account, namely, that one who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise." Irving Trust Co. v. Deutsch, 73 F. (2d) 121, 125 (C. C. A. 2d, 1934), citing Jackson v. Smith, 254 U. S. 586 (1921); *cf.* Wendt v. Fischer, 243 N. Y. 439, 154 N. E. 303 (1926).

[28]BALLANTINE, *op. cit. supra* note 12, at 596; 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 998; 13 FLETCHER, *op. cit. supra* note 12, c. 58, § 5795; Brewer v. Proprietor of the Boston Theatre, 104 Mass. 378 (1870); Russell v. Henry Patterson Co., 232 Pa. 113, 81 Atl. 136 (1911).

[29]LeMaster v. People, 54 Colo. 416, 121 Pac. 269 (1913); People v. Butts, 128 Mich. 208, 87 N. W. 224 (1901); State v. Linden, 171 Wash. 92, 17 P. (2d) 635 (1932). The directors must have full knowledge and not a perfunctory report. People v. Binga, 360 Ill. 18, 195 N. E. 437 (1935); see House v. United States, 78 F. (2d) 296 (C. C. A. 6th, 1935), *cert. denied* 296 U. S. 608 (1935). The same rule was announced in a civil action on a cashier's bond, *i.e.*, that the board had no power to authorize fraud. Minor v. Mechanics' Bank of Alexandria, 26 U. S. 46 (1828). "We are not willing to sanction a doctrine which prevents conviction for embezzlement, because the funds were converted with the consent of the board of directors, unless it appears to have been given in good faith and knowledge of the facts." McKnight v. United States, 115 Fed. 972, 987 (C. C. A. 6th, 1902).

[30]People v. Talbot, 22 P. (2d) 587 (Cal. App. 1933), *aff'd.* 220 Cal. 3, 17, 28 P. (2d) 1057 (1934).

[31]BERLE AND MEANS, *op. cit. supra* note 23, at 236, 237; BALLANTINE, *op. cit. supra* note 12, at 359; 3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 1000, 1062; Manson v. Curtis, 223 N. Y. 313, 119 N. E. 559 (1918); People v. Marcus, 261 N. Y. 268, 185 N. E. 97 (1933), citing Kavanaugh v. Commonwealth Trust Co. of N. Y., 223 N. Y. 103, 119 N. E. 237 (1918); Note (1930) U. S. L. REV. 281; Comment (1932) 1 BROOKLYN L. REV. 28. Compare Venner v. Chicago City Ry., 258 Ill. 523, 101 N. E. 949 (1913).

While those exercising "control", although fiduciaries, may often not be of any of the classes of fiduciary designated by the embezzlement statutes, still the fact that they are regarded as fiduciaries of another kind would seem to have considerable bearing upon whether or not a more uncompromising attitude should be taken toward them when they act through others, who are within the designated classes, and are charged as aiders and abettors, than should be taken toward other aiders and abettors who are not themselves fiduciaries of any kind.

3. Profits Made by Directors and Officers as Corporate 'Property'

Directors and officers have been held rather generally to account for profits made by them from transactions in which they acted adversely to corporate interests by speculating in the corporation's own securities, by selling corporate officers, by selling to or purchasing from the corporation, and by exploitation of corporate opportunities and "inside information". This rule has been held applicable in some cases even where the corporation suffered no loss or was unable, or unable to fully take advantage of the opportunities. The rule is that such profits are corporate 'property' and may be recovered for the benefit of the corporate treasury.[32] If the person so receiving such profits occupies one of the fiduciary relations designated in embezzlement statutes, it is conceivable that his act of disposing of them for his own use or of refusing to account and pay over on demand is fraudulent conversion.[33] If he is an officer who individually might have 'possession' of corporate 'property', there is no great difficulty in considering his 'possession' of the profits as 'possession' of 'property' belonging to the corporation obtained in the course of his employment.[34] If he is a director or other fiduciary, such as one exercising "control" through stock ownership or otherwise, he might come within the compass of those embezzlement statutes embracing "any person

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[32]BALLANTINE, *op. cit. supra* note 12, 376-381; 3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 884, 888, 892, 898-905; Irving Trust Co. v. Deutsch, 73 F. (2d) 121 (C. C. A. 2d, 1934); Lewis v. State, 30 Ariz. 466, 248 Pac. 39 (1926); Dixmoor Golf Club, Inc. v. Evans, 325 Ill. 612, 156 N. E. 785 (1927); Seymour v. Spring Forest Cemetery Assn., 144 N. Y. 333, 39 N. E. 365 (1895); McClure v. Law, 161 N. Y. 78, 55 N. E. 388 (1899); Young v. Columbia Oil Co., 110 W. Va. 364, 158 S. E. 678 (1931); Notes (1935) 35 COL. L. REV. 289, (1934) 44 YALE L. J. 527. The theory seems to be that the opportunities and "inside information" may, like goodwill (see 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 1016), be regarded as a sort of 'property' belonging to the corporation. Some courts hold such transactions by directors and officers invalid by virtue of the fiduciary relation alone; the majority, that the test is fairness and good faith; but all insist on good faith and absence of fraud. BALLANTINE, *op. cit. supra* note 12, at 930, 931; 3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 923, 926, 930, 931; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587 (1875); *In re* American Range & Foundry Co., 22 F. (2d) 558 (D. C. Minn. 1927). The cases are usually on officers and directors, but note: "This applies equally well, without doubt, to profits made by majority stockholders." 13 FLETCHER, *op. cit. supra* note 12, c. 58, § 5846, citing Donalson v. Investors' Realty Corp., 139 Atl. 766 (Del. Ch. 1927); also 142 Atl. 831 (1928).

[33]On refusal to account and pay over on demand as embezzlement, see Enzor v. State, 167 So. 336 (Ala. App. 1936) *cert. denied*, 167 So. 340 (1936); People v. Gordon, 206 Cal. 29, 273 Pac. 568 (1928); People v. Cowgill, 334 Ill. 635, 166 N. E. 535 (1929); People v. Ehle, 273 Ill. 424, 112 N. E. 970 (1916); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911).

[34]'Possession' need not be strictly lawful. People v. Gordon, 206 Cal. 29, 273 Pac. 568 (1928); People v. Butts, 128 Mich. 208, 87 N. W. 224 (1901); Smith v. State, 53 Tex. Cr. 117, 109 S. W. 118 (1908).

entrusted" or "other person acting in fiduciary capacity". The fact that his 'possession' is not acquired lawfully makes no difference;[35] it is enough that he is a fiduciary for the corporation and that he has 'property' of that corporation which he got hold of by means of that fiduciary relation.[36] He might be held liable as a trustee; for, although it has been said that the word "trustee" in an embezzlement statute means a trustee of a trust voluntarily imposed and voluntarily accepted[37] and although it may be contended that trusts such as those here considered are constructive and imposed against the will, there is authority to the effect that the trust imposed by law is enough to support an embezzlement conviction.[38] If he is a director and directors are named in the applicable embezzlement statute, it still may be contended that an individual director cannot have 'possession' of corporate 'property', since only the board as a whole is so authorized; but he is a fiduciary and has 'possession' in fact, which may be obtained in abuse of the relation as well as in the lawful performance of his functions.[39]

4. Profits from "Control" as Corporate 'Property'

It may be suggestive to muse for a moment on such problems as those involving the profits from selling "control",[40] and those involving profits made by a director or officer in buying stock of the corporation from a stockholder without full disclosure.[41] As we

[35]"We know of no instance like this where one in charge of the goods and business of a corporation of which he is president, but not in charge of its funds, and who wrongfully directs checks, which should have been paid to the corporation, to be made payable to himself, and then uses the money for his own purposes, can escape the imputation of embezzlement. This is not a case where one lawfully comes into possession of money or property of his debtor, who simply refuses to settle until his debtor settles with him. The accused here abused his trust, wrongfully acquired possession of the money of his principal and used it for his own purposes." Boyd v. Commonwealth, 156 Va. 934, 943, 157 S. E. 546, 549 (1931).

[36]State v. Sullivan, 129 Wash. 42, 224 Pac. 586 (1924).

[37]People v. Epstein, 245 N. Y. 234, 157 N. E. 121 (1927).

[38]Neal v. State, 55 Fla. 140, 46 So. 845 (1908). Though the defendant in this case was a laundress, the humbleness of her social position ought not to invalidate the analogies of the rule when defendants more highly placed are at bar. *Noblesse oblige* might require a more elegant and stricter rule in the latter cases.

[39]Boyd v. Commonwealth, 156 Va. 834, 157 S. E. 546 (1931); State v. Sullivan, 129 Wash. 42, 224 Pac. 586 (1924); and cases cited *supra* note 34.

[40]BERLE AND MEANS, *op. cit. supra* note 23, at 243, 244: "There, a small group of dominant stockholders in the Loew Theatre chain arranged to sell their stock to interests dominated by Mr. William Fox. The price they received was nearly double the current market price of the shares. The obvious reason for the terrific premium paid by Fox was that these shares carried 'control'. In a word, he was buying power and not stock."

[41]The minority rule is that directors and officers occupy a fiduciary relation with respect to the individual stockholder in such cases. BALLANTINE, *op. cit. supra* note 12, at 396-398; 3 FLETCHER, *op. cit. supra* note 12, c. 11,

have observed, it has repeatedly been laid down by any number of the most respectable courts that any one who exercises "control" over a corporation's 'property' as a director, officer, agent, dominant stockholder, and possibly in any other way, must exercise his power for the good of the corporation. And it has been held that the benefits accruing from "inside information" may be treated as belonging to the corporation. If the logic of these holdings is to be followed, it does not seem "too great a leap into the dark . . . . to say that the power going with 'control' is an asset which belongs only to the corporation; and that payment for that power, if it goes anywhere, must go into the corporate treasury." Nor does it seem "too great a leap into the dark" to say that the profits, arising out of a director's or officers's purchase without full disclosure of corporate stock from a stockholder accrue from the exploitation of an advantage belonging to the corporation and that, therefore, the profits belong to the corporation.[42] If such views be taken, the profits might then be thought to be held within such a relation as would bring a refusal to account and pay over on demand within the ambit of the law of criminal breach of trust.

5. Problems When Corporation a Trustee for a Third Person

Other problems with respect to the defendant's having 'possession' in his fiduciary capacity have been encountered in those situations in which the corporation held the 'property' of a third person on some trust, and an officer or agent of the corporation is charged with embezzling it. If the charge alleges 'ownership' in the third person, the way is opened for the defense contention that the defendant sustained no fiduciary relation with the third person; that relation having been between the third person and the corporation. However, it is widely held that the officer may be charged as the *agent* of the third party,[43] on the view that he sustains the

§§ 848, 1168; Hotchkiss v. Fischer, 136 Kan. 530, 16 P. (2d) 531 (1932). Note also the joint-adventurer [Dutton v. Barnes, 162 Minn. 430, 203 N. W. 414 (1925)] and special facts [Strong v. Repide, 213 U. S. 419 (1909)] doctrines.

[42]Thus escaping the difficulties encountered in holdings that the director or officer is not a fiduciary for the individual stockholder but for the corporation.

[43]3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 1348, 1351; State v. Lake, 99 Mont. 128, 43 P. (2d) 627 (1935); Brown v. State, 3 Ohio App. 52 (1914); Hitchcock v. State, 47 Ohio App. 90, 190 N. E. 773 (1933); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911); Milbrath v. State, 138 Wis. 354, 120 N. W. 252 (1909); State *ex rel.* Kropf v. Gilbert, 213 Wis. 196, 251 N. W. 478 (1933). The following cases apparently are to the same effect: People v. Fleming, 17 P. (2d) 1042 (Cal. App. 1932), *rehearing denied* 220 Cal. 601, 32 P. (2d) 593 (1934); Commonwealth v. Moore, 166 Mass. 513, 44 N. E. 612 (1896); State v. Thomas, 123 Wash. 299, 212 Pac. 253 (1923). The rule is the same where a partnership holds 'property' of a third person in trust and a member of the firm embezzles it. Kennedy v. State, 196 N. E. 316 (Ind.

same relation to the third party as the corporation. The corporation has *technical* 'possession' and the officer actual 'possession'; and the 'possession' of different persons may, of course, be concurrent, even if of the same nature.[44] Moreover, whatever be the relation between the corporation and the third person—whether that of debtor or creditor, bailor and bailee, trustee and *cestui*—the corporation itself has sufficient interest in the 'property' to sustain a charge of embezzlement of it by an officer or agent of the corporation.[45] There also is authority for holding officers as aiders and abettors of the corporation in the corporate act by which the 'property' was converted.[46]

6. Liability of Directors and Officers for Acts of Other Persons—Guilty Knowledge

Corporate directors and officers are not liable for the acts of other directors, officers, and agents merely by virtue of their being the superiors of those others. They are liable for their own affirmative misconduct and negligence, and their liability extends to

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1935); People v. Meadows, 199 N. Y. 1, 92 N. E. 128 (1896).

State v. Parker, 112 Conn. 39, 151 Atl. 325 (1930) is *contra*, but the ruling is based expressly on a distinction, not very convincingly found, in the Connecticut statute.

The fiduciary relation may be regarded as direct between the officer and the third party and the corporate transaction treated as a pretense. State v. MacCollough, 115 Conn. 306, 161 Atl. 412 (1932). And see Wille v. State, 207 Wis. 163, 240 N. W. 823 (1932).

[44]See cases cited *supra* note 18.

[45]Spencer v. United States, 169 Fed. 562 (C. C. A. 8th, 1909): United States v. Jenks, 264 Fed. 697 (E. D. Pa. 1920); Reeves v. State, 95 Ala. 31, 11 So. 158 (1891); Yoder v. State, 194 N. E. 645 (Ind. 1935); Walter v. State, 1 N. E. (2d) 127 (Ind. 1936). This rule is the same if the *principal* is an individual. Campbell v. State, 35 Ohio St. 70 (1870). Any interest on the part of the *principal* is sufficient to sustain the charge of embezzling the 'property' as that of the *principal* [People v. Jasiecki, 301 Ill. 23, 133 N. E. 281 (1921); People v. Pentis, 362 Ill. 306, 199 N. E. 805 (1936); Coney v. State, 100 Tex. Cr. 380, 272 S. W. 197 (1925); State v. Whitworth, 30 Wash. 47, 40 Pac. 254 (1902)], even the technical right of possession such as a corporate bailee has which must be effectuated through the actual 'possession' of the officer charged or title as trustee with the entire beneficial interest in the third person [Spencer v. United States, United States v. Jenks, Reeves v. State, Yoder v. State, Walter v. State, all *supra*; People v. Sherman, 133 N. Y. 349, 31 N. E. 107 (1892)].

[46]See Article (1928) 28 COL. L. REV. 1, at 16-28; Note (1930) 40 YALE L. J. 602. Although it is admitted that where the corporate act is criminal, the act of the officer doing it is also criminal [Crall v. Commonwealth, 103 Va. 955, 49 S. E. 638 (1905)], there are difficulties in charging the officers as aiders and abettors. For instance, the statute may provide for imprisonment only; in that case the alleged corporate principal is not subject to the provision and, there being no principal, there can be no aider and abettor. People v. Strong, 363 Ill. 602, 2 N. E. (2d) 942 (1936). The escape, in a state where it has been held that there is no fiduciary relation between the third party and the officers, seems to be to charge embezzlement alleging that the 'property' belonged to the corporation.

the acts of other persons only when they cause such acts to be done.[47] Especially is this principle applicable with relation to criminal responsibility. Directors and officers are liable for the acts of others when they have instigated them, participated in them, or initiated them by doing some act themselves from which consequences follow in the routine conduct of others in the course of corporate business. The initiating and participating directors or officers, when the conduct is criminal, act as sole or joint principals; and, in such instances, the usual criminal rules concerning "guilty knowledge" apply so that the consequences must be known or foreseeable.[48] Directors and officers are liable as aiders and abettors, and doubtless as accessories before the fact or procurers, where they know of the conduct of the principal offender and in some way induce or encourage it. Here also the same criminal rules of "guilty knowledge" must be satisfied.[49] Misconduct of this description is affirmative misconduct; and, as we have already noted, criminal breach of trust is always affirmative and not mere negligence. However, it must be borne in mind that courts have taken the view that, when a superior who is under a duty to prevent the misconduct of others knows of their misconduct and fails to take action, his conduct is not mere silence but amounts to active aid.[50]

7. Proximate Causation

Since in criminal breach of trust active misconduct is, at least by legal hypothesis, dealt with, the difficulties of tracing causation, encountered in connecting a corporate loss with the negligence[51] of a director or officer, usually do not arise. Some one has acted affirmatively, even though a "passively encouraging" aider and abettor is at bar; the loss is particular and the result of a particular transaction. The general shortage cases may cause some confusion of thought here; but it is believed that these cases involve fiduciaries having relatively narrow powers, not including the power of incurring the risks of profit-making enterprises but lim-

[47]BALLANTINE, *op. cit. supra* note 12, 363-367; 3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 1065, 1066, 1067, 1069, 1070.

[48]3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 1348, 1349, 1351; United States v. Fish, 24 Fed. 585 (C. C. N. Y. 1885); Hitchcock v. State, 47 Ohio App. 90, 190 N. E. 773 (1933); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911); State v. Thomas, 123 Wash. 299, 212 Pac. 253 (1923); Milbrath v. State, 138 Wis. 354, 120 N. W. 252 (1909); State *ex rel.* Kropf v. Gilbert, 213 Wis. 196, 251 N. W. 478 (1933).

[49]See authorities *supra* note 48, especially State v. Thomas, Milbrath v. State, and State *ex rel.* Kropf v. Gilbert.

[50]State v. Thomas, 156 Wash. 583, 287 Pac. 667 (1930); State v. Linden, 171 Wash. 92, 17 P. (2d) 635 (1932).

[51]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 1087; Barnes v. Andrews, 298 Fed. 614 (S. D. N. Y. 1924).

ited to the narrower risks of keeping funds safely and expending them as directed. In these latter situations, a shortage must, except under extraordinary circumstances be the result of the misconduct of the particular person, who, by failing to explain, leaves no other reasonable inference to be drawn.[52] Where fiduciaries of wide and miscellaneous powers, especially powers of investing in other than the safest securities, are involved, the prosecutions are based, it is believed uniformly, upon particular transactions. It seems that they must be; for the procedure of the general shortage cases would not produce an abiding conviction that the loss resulted from the conduct of the defendant. Hence, it can be repeated that in applying the law of criminal breach of trust to corporate mismanagement, we shall have to consider only affirmative misconduct and clearly traceable losses resulting therefrom. This thought ought to be reassuring to the fearful who may anticipate an attempt to show that directors and officers are guilty of embezzlement, because losses have been suffered by a corporation from a general shrinkage of values. Liability for such losses must be considered under the law of negligence, with which the law of embezzlement, apparently, has nothing to do. Embezzlement embraces unlawful withdrawals of 'property' already acquired, not failures to dispose of 'property' or failures to make profits.

8. Burden of Proof

Directors and officers, being fiduciaries, are subject to the usual procedural rules applicable in cases involving fiduciaries. One such rule only will be noted at this point. They bear the burden of proof in estabishing their good faith.[53] This rule, we have observed, finds not only faint but quite loud echoes in criminal prosecutions.[54] If other fiduciaries, such as those exercising "control" through dominant stock ownership or by other means, are brought into the criminal courts, doubtless this same rule, as well as the rule concerning "guilty knowledge", aiding and abetting, and proximate causation, would apply to them.

9. What is Conversion of Corporate 'Property'?

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[52]Willis v. State, 134 Ala. 429, 33 So. 226 (1902); State v. Larmer, 30 Del. 279, 105 Atl. 789 (1918); State v. Glaze, 177 Iowa 457, 159 N. W. 260 (1916); Hamer v. State, 60 Tex. Cr. 341, 131 S. W. 813 (1910); State v. Secor, 119 Wis. 621, 95 N. W. 942 (1903). See also People v. Mooney, 330 Ill. 565, 162 N. E. 148 (1928).

[53]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 974.

[54]Agnew v. United States, 165 U. S. 36 (1897); Reeves v. State, 95 Ala. 31, 11 So. 158 (1891); Enzor v. State, 167 So. 336 (Ala. 1936), *cert. denied* 167 So. 340 (Ala. 1936); Zuckerman v. People, 213 Ill. 114, 72 N. E. 741 (1904); Commonwealth v. Winegard, 119 Pa. Super. 78, 180 Atl. 160 (1935); Powell v. State, 82 Tex. Cr. 163, 198 S. W. 317 (1917).

Having noticed the wide range of persons who may take a hand in mishandling corporate 'property' embraced within the fiduciary relations of the embezzlement statutes, conduct amounting to fraudulent conversion must next be considered. Directors and officers are liable for conversion of corporate 'property';[55] and conversion means uses other than corporate uses; in other words, "funds of a corporation can be lawfully used for corporate purposes only . . . ."[56] The duties of directors and officers are defined in the same way, *i.e.*, their duties are to manage the corporate assets for the preservation and promotion of corporate interests;[57] their powers, likewise.[58] The powers of a corporation are those appropriate to the objects of the corporation.[59] Limitations on powers and imposition of duties to refrain from such-and-such conduct are corollaries or implications of the positive powers and positive duties directed to the affirmative achievement of corporate ends. We have already noted that courts follow the same line of thought in solving problems of conversion in embezzlement prosecutions.[60] This method puts into the forefront the factual expectations of the corporation; the approved factual expectations are recognized by imposing duties and conferring powers to realize them; and these in turn imply duties to refrain and limitation of powers. Such practice makes it necessary to inquire concerning the general nature of corporate purposes, (ends, or interests), and in general concerning the positive duties of directors and officers to realize these purposes; for only thereby can it be determined

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[55]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 1102.

[56]Dolphin v. A. C. Lewis Leather Co., 269 Mass. 132, 168 N. E. 727 (1929); 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 1102.

[57]BALLANTINE, *op. cit. supra* note 12, at 358-370; 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 850. Hereafter, directors and officers only will be considered. The general principles applying to them apply generally to any *agent* who has 'possession' of corporate 'property'. Generally, directors and officers can be considered together without distinction. 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 991.

[58]BALLANTINE, *op. cit. supra* note 12, at 367; 2 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 434, 505, especially at 230, 293; 3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 1021, 1022.

[59]BALLANTINE, *op. cit. supra* note 12, at 194; 6 FLETCHER, *op. cit. supra* note 12, c. 24, §§ 2483, 2487.

[60]Knight v. State, 152 Ala. 56, 44 So. 585 (1907); People v. Ward, 134 Cal. 301, 66 Pac. 373 (1901); State v. Sanders, 127 Kan. 481, 274 Pac. 223 (1929); Bartley v. State, 53 Neb. 310, 73 N. W. 744 (1897), 55 Neb. 294, 75 N. W. 832 (1898); Powell v. State, 82 Tex. Cr. 163, 198 S. W. 317 (1917); note the reasoning in Yoder v. State, 194 N. E. 645 (Ind. 1935); Kennedy v. State, 196 N. E. 316 (Ind. 1935); Walter v. State, 1 N. E. (2d) 127 (Ind. 1936); People v. Marcus, 261 N. Y. 268, 185 N. E. 97 (1933); Commonwealth v. Kaufman, 9 Pa. Super. 310 (1898); Commonwealth v. Levi, 44 Pa. Super. 253 (1910).

what are withdrawals of 'property' from corporate uses and what duties to refrain are thereby violated.[61]

A. The Legal Relations Involved

a. Relations of Directors

It is apparent that reference must here be made to the relations between the directors and officers and the corporation, between the directors and officers, and the stockholders and creditors. Discussion of the relations of directors is sufficiently illustrative for present needs; for "to a great extent the rules governing are the same without regard to whether the officer sued is a director or some other officer such as the president, vice president, secretary, treasurer, general manager, cashier or the like."[62] Directors are spoken of as agents and as trustees, although it is everywhere admitted that they are such only by analogy and that their relations are *sui generis*.[63] But the analogies are useful and are constantly utilized. As between themselves and the corporation, the directors are often said to be agents; but they are also said to be trustees.[64] "The relation of the directors to the stockholders is essentially that of trustee and *cestui que trust*."[65] Uncertainty here is evident. It is somewhat unconvincing to call directors agents, because in a true agency there is a principal capable of independent action;[66] and it is likewise somewhat unconvincing to call them trustees, because they do not have title to the corporate 'property'.[67] With respect to the stockholders, the

[61]The conduct must be illegal, *i.e.* must be a breach of duty. The duty violated in conversion is a duty to refrain from conduct not in the "due execution of the trust."

[62]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 991, at 382. "At the same time, the duties of active officers of a corporation who devote all, or the greater portion, of their time to the business of the corporation, and who receive a salary as such officers, are more extensive than those of a director who does not give the corporation daily attendance and who receives either no compensation or a more or less nominal sum for attending directors' meetings; and it follows that the liabilities of officers other than directors, for mismanagement, may be, and often are, more extensive than those of directors." 3 FLETCHER, *loc. cit. supra*. But evidently these liabilities, though more onerous, are not essentially different in nature.

[63]BALLANTINE, *op. cit. supra* note 12, at 358-360; 3 FLETCHER, *op. cit. supra* note 12, c. 11, §§ 838, 841, 842, 847; Note (1933) U. OF PA. L. REV. 364.

[64]BALLANTINE, *op. cit. supra* note 12, at 358, 359; 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 838.

[65]Manson v. Curtis, 223 N. Y. 313, 323, 119 N. E. 559, 562 (1918); 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 838, at 145, 146, citing Farwell v. Pyle-National Electric Headlight Co., 289 Ill. 157, 124 N. E. 449 (1919), and Gilmore v. J. W. Gilmore Drug Co., 279 Pa. 193, 123 Atl. 730 (1924). "They are practically trustees, with the whole body of the stockholders as cestuis que trust"; but not trustees for the individual stockholders, except in a very limited and special sense. 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 848.

[66]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 839.

[67]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 853.

directors are not agents; they cannot enter into agreements with third parties binding the stockholders to the third persons directly, the stockholder's obligation being to the corporation on his own contract with the corporation.[68] Nor, in any strict sense, are the directors trustees for stockholders, since they do not have title. "The peculiar relation that they bear to the corporation and the owners of its stock grows out of the inability of the corporation to act except through such managing officers and agents."[69]

The closest analogy is that the corporation holds the title to the corporate 'property' as trustees for the stockholders, and the directors are agents of the corporation to execute that trust. This view explains why the relation between the directors and stockholders "is essentially that of trustee and *cestui que trust*",[70] but is not strictly or literally such a relation. The directors are agents charged with performing the trustee obligations of the corporation to its stockholders, *i.e.*, they are agents of a trustee incapable of acting except through agents. "The peculiar relation . . . . grows out of the inability of the corporation to act except through such managing officers and agents."[71] This view explains also why the directors are called agents as between them and the corporation. "The corporation is the owner of the property, but the directors in the performance of their duty possess it, and act in every way as if they owned it."[72] In short, they are agents in possession rather than trustees. But again their agency is a peculiar one, the peculiarity growing "out of the inability of the corporation to act except through" them. This peculiarity must be kept in mind. However, it should not be forgotten that, although an agent in possession of his principal's 'property' is in some sense a trustee, an agent not having title but having possession of 'property' of his principal is still an agent. This view of directors' relations is in harmony with the theory of the derivative suit, which is that the stockholders, by virtue of a trustee obligation owed to them by the corporation, enforce a claim of the corporation upon its directors and not a trustee obligation owing by the directors to them.[73] The view seems too to be in harmony with certain creditors' rights as set out in the following quotation:

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[68]BALLANTINE, *op. cit. supra* note 12, at 643-645, on the nature of a stockholder's obligation to pay the subscription price of his stock.

[69]Manson v. Curtis, 223 N. Y. 313, 323, 119 N. E. 559, 562 (1918).

[70]*Ibid.*

[71]*Ibid.*

[72]*Ibid.*

[73]"The theory may, however, be suggested that the true basis of the stockholder's suit is an obligation owed by the corporation to the stockholders, like the obligation of a trustee to the beneficiary, which may be specifically enforced when the corporation is put in default in its duty to preserve the corporate property, and assert its rights and claims against wrongdoers."

> "Some of the courts have held that mere creditors of an insolvent bank or other corporation cannot sue, even in equity, to hold directors or other officers liable for losses due to mere negligence, although a cause of action therefor may exist in favor of the corporation, on the ground that there is no trust relation or privity between the officers and creditors. The weight of authority, however, is to the contrary and in favor of recovery by creditors. Most of the courts have based the right of creditors to sue on the ground that there is a trust relation between the officers and creditors, or a *quasi* trust relation; but there certainly is not 'trust relation', in the proper sense of the term. The proper view is that the officers become liable to the corporation for the loss sustained by it, and that this liability is a part of its assets, which may be enforced in equity, as other equitable assets may be collected, for the purpose of satisfying the claims of creditors."[74]

All of this seems to say that the corporation owes obligations to the stockholders and creditors (fiduciary obligations to the stockholders and after insolvency fiduciary obligations to creditors). And the directors owe fiduciary obligations to the corporation to perform the corporate duties to its claimants.

b. The Corporate *Persona*

Since a corporation owes duties to stockholders and creditors and since the directors owe duties to the corporation to perform these duties of the corporation to its claimants and are given their powers for the purpose of doing so, the question arises: Why not disregard the corporate *persona* and treat the relations as subsisting between the claimants and the directors? After all, is not the corporate entity a fiction? The "realistic" view of this situation has been cogently expressed by Wesley Newcomb Hohfeld. He wrote:

BALLANTINE, *op. cit. supra* note 12, at 611, 612; See 13 FLETCHER, *op. cit. supra* note 12, c. 58, § 5911; Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1935); Brewer v. Proprietor of the Boston Theatre, 104 Mass. 379 (1870).

There is a distinction between the derivative suit, in which the stockholder sues to enforce a claim of the corporation, and the representative suit, in which the stockholder sues to enforce a claim of a class. BALLANTINE, *op. cit. supra* note 12, at 607; 13 FLETCHER, *op. cit. supra* note 12, c. 58, § 5908. However, in the representative suit, the claimant is in effect suing upon a claim against the corporation and to enforce the duty of the directors to the corporation to perform the corporation's duty to him and the class which he represents. For that matter, is not every suit against a corporation, even that on a simple debt, one to compel the directors to perform their obligation to the corporation by performing the corporation's obligation to the complainant?

[74]BALLANTINE, *op. cit. supra* note 12, at 371, 372.

"Strangely enough, it has not always been perceived with perfect clearness that transacting business under the forms, methods, and procedure pertaining to so-called corporations is simply another mode by which individuals or natural persons can enjoy their property and engage in business. Just as several individuals may transact business collectively as partners, so they may as members of a corporation—the corporation being nothing more than an association of such individuals."[75] A footnote to the first sentence above continued:

"This, it may be emphasized, is not intended as a mere 'theory' of corporations differing from certain other so-called theories; it is believed to be an ultimate fact which, for the sake of clear thinking, all should constantly recognize, however much they differ as to the practical and legal consequences of that fact.

"The necessity of emphasizing, for the purposes of this article, the realities of corporate forms, methods and procedure and of looking beneath the fictional language tending to obscure those realities seems evident if we notice the reasoning of Romer, L. F., in case before us, *Risdon, Iron, etc., Works v. Furness* (1906) 1 K. B. 49, 59; 'I need hardly point out that the shareholder and the company are different entities . . . . If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforceable in this country say that the company, trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable.' "

We shall not pause to demonstrate or refute, but we shall heed Hohfeld's adjuration to keep the "realities" in mind. It is needful, however, to remark that the corporate *persona* is no more fictional than the *persona* (more truly, perhaps, *personae*) of a natural person. Both are concepts; each "is a mere ideal or conceptual point of reference"[76] to which are referred the terminals of legal relations. "The rights and litigations attributed to the conceptual persona (*i.e.*, the legal person) are in the end practically realized through the activities of human beings."[77] "The conceptual view of personateness is not in conflict with realism,

[75]HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 197, reprinted from Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COL. L. REV. 285, 288.

[76]KOCOUREK, JURAL RELATIONS (1st ed. 1927) 292.

[77]KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW (1930) 284.

but is a device to further realism by facilitating its operations."[78] For instance, a human being may have more than one *persona*. He has his own proper legal person; but he may also be the trustee of one estate and the administrator of another. He then becomes the "substrate"[79] of, or has, three *personae*, about each of which is clustered a different set of legal relations. Just as in mathematics we must use different symbols to keep our thinking "straight", we must, in such a case, have three points of reference to keep our legal calculus "straight", so that in the end the "realities" are "practically realized through the activities of human beings". These points of reference are *personae*; they serve a similar purpose and have the same kind of existence as mathematical points of reference (symbols), and are just as necessary. The separate *persona* of a corporation aggregate is not different from, and not less necessary than, any of the *personae* of our natural person in the situation just mentioned; not even different from the natural person's legal person which he has *in propria personae*. All are "mere ideal or conceptual point(s) of reference" in legal thinking and have their justification in affording a needed "device to further realism by facilitating its operations".

Notwithstanding the utility, or the necessity, of *personae* in legal reasoning, no absolutely compelling reason appears why the "realities" between the natural persons who are directors of corporations and the natural persons who are stockholders or creditors could not have been worked out without the separate corporate *persona*. However, they were not; and so it seems easiest, if not best, to go along with the old "fictions", always keeping one's eyes wide open to prevent their obscuring the "realities", rather than to try to re-write the language, in which effort might be created some new obscure terms and some fictions. Moreover, those who have created the corporate system have so often called upon the name of the separate corporate entity that they are estopped to deny its burdens after having partaken so lavishly of its largess; a bit of justice which they might escape in the welter of a new terminology.

c. The Ultimate Burden and Benefit of the Relations

But we must heed Hohfeld's admonition and attend to the "realities"; and the "realities", in the present connection, are these: The burdens of managing corporate affairs do, in practical realization, fall upon natural persons and those natural persons are the directors (and officers). The benefits of corporate

[78] *Id.* at 278.
[79] Kocourek's word. See KOCOUREK, *op. cit. supra* note 77, at 302.

enterprise do inure to natural persons; for the corporation itself can partake of no benefits but holds its 'property' solely for the benefit of the natural persons who are its stockholders and creditors.[80] What these beneficiaries have a legal right to expect is the measure of what the directors (and officers) have a legal duty to do; their expectations, which the corporation owes a duty to them to fulfil, are the expectations which the directors (and officers) owe a duty to the corporation to fulfil; and this is clear upon analysis.

The corporation as a principal, in the analogy of a principal-and-agent relation between it and its directors, is peculiar not only in that it is incapable of independent action but also in that it is incapable of enjoying any of the benefits of its 'property'.[81] The agent of a natural person, who has 'possession' and is charged with the care and management of the principal's 'property', is under duties which may roughly be described as follows: the agent shall exercise due diligence, competence, and care, and the utmost good faith, to preserve the 'property' and to increase it; he shall not expend or "withdraw" any of it, except as such expenditures and withdrawals are reasonable efforts directed to the preservation and increase of the 'property', and shall not pay out except upon claims against the principal properly incurred; and he shall account to and pay over the net proceeds to the principal, who can then enjoy them as he sees fit. The duties of directors are the same,[82] except that their duty to pay over the net proceeds

[80]Even if the stockholder (or creditor) be another corporation. After working through the maze, the benefit must land in the lap of some natural person; or there is no benefit. "Sometimes, aggregates of material thing elements and also jural relations may be jurally personified, but such types of personateness are not ultimate. They are surrounded by other personae whose substrate is a human being, however, many the intermediate steps. For example, an aggregate of jural relations consisting of rights and ligations might be personified as *A*; the rights might be held by a corporation *B* and the ligations by another corporation *C*. The complexity might be increased by assuming other corporations and foundations which own all of the capital stock of *B* and *C*, respectively; but yet in the last resort, jural relations would be found which center in a jural person whose substrate is a single human body." KOCOUREK, *op. cit. supra* note 76, at 312 (By "ligations" is meant the burden side of legal relations; and by "rights," the benefit side.)

[81]"Property of the corporation belongs to it and not to its stockholders, although the stockholders are the ultimate or equitable owners of its assets." 13 FLETCHER, *op. cit. supra* note 12, c. 58, § 5753.

[82]Note the following on paying invalid claims of other persons: 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 1112; Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523 (1906); Beers v. New York Life Ins. Co., 66 Hun. (N. Y.) 75, 20 N. Y. S. 788 (1892); Mutual Life Ins. Co. v. Grannis, 57 Misc. 174, 107 N. Y. S. 926 (1907), 60 Misc. 187, 112 N. Y. S. 1074 (1908). And the following on gifts of corporate 'property', especially the distinction made when pecuniary advantage to the corporation indirectly accrues; BALLANTINE, *op.*

is, both during the continuance of the corporation as a going concern and at dissolution, not to pay to the principal but to those for whom the principal holds beneficially.[83] This peculiarity is appreciated when the matter of piling up a surplus without declaration of dividends is considered. The directors undoubtedly are authorized to accumulate a surplus and, insofar as this procedure is a reasonable exercise of discretion in a matter calling for business judgment, their decision to retain the surplus in the corporate treasury is unimpeachable. But their function is not merely to pile up and keep piling corporate assets, as well they might if their principal were a natural person; they may be required to declare reasonable dividends.[84] And the peculiarity is apparent where the sole stockholder, or all of the stockholders, or a majority of stockholders participate in an act.

> "If an officer is the owner of all the stock of a corporation, it seems that he may use the corporate assets as he sees fit, and there can be no misappropriation of corporate assets by him; but if there is even one share of stock outstanding he cannot use the corporate assets to pay his individual debts without the consent of the holder of such one share of stock. Directors or other officers who misappropriate funds are liable to the corporation just the same as if they had taken the money or property of an individual, notwithstanding they owned substantially all of the stock."[85]

The statements contained in the foregoing quotation are inaccurate in one respect: the corporation should, in each frame of reference, be denominated "solvent", for if the corporation is in-

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cit. supra note 12, at 207; 2 FLETCHER, *op. cit. supra* note 12, c. 11, § 520; 6 *Id.*, c. 36, § 2938.

Since, in this study, withdrawals of assets already acquired are dealt with, and since in criminal breach of trust there must be actual loss or risk of actual loss, acts merely *ultra vires*, which are technical breaches but may enrich the corporation, need not be considered.

[83]"This creature of law, endowed with the qualities in law of a natural person to a certain extent, is charged as such with the duties to hold, and ultimately to dispose of, the property which it may take, to certain ends only, *viz*: (1) the payment of the debts and other obligations incurred by it, and (2) to the distribution of the balance among those who hold its stock, as a corporate liability, in the proportion fixed by law." Taylor v. Commonwealth, 119 Ky. 731, 746, 75 S. W. 244 (1903).

[84]BALLANTINE, *op. cit. supra* note 12, at 506; 11 FLETCHER, *op. cit. supra* note 12, c. 58, § 5325; Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919).

[85]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 1103; see also 3 *Id.* c. 11, § 884, at 216.

solvent, creditors too have claims with regard to the 'property' like unto those of *cestuis que trust*.[86]

d. The Claims of Stockholders and Creditors

Since the measure of directors' proper functions, with regard at least to withdrawing, paying out, or applying corporate 'property', is the claims of stockholders and creditors upon the corporation, it is essential to ascertain in general what these claims are. Only thereby can it be told what is not applying to corporate purposes, or what is misapplying, converting to other than corporate uses, or causing actual loss to the corporation. These claims in general are:

Stockholders—Their claims, as between them and the corporation, are analogous to those of *cestuis que trust*.[87] They have the right to expect[88] that, when dividend-paying time comes around, the dividends will be paid to them;[89] and, of course, when distribution of capital is to be made, that their several shares will be paid to them. And they have the right to expect more. They have the right to have the directors, day by day, so hold and manage the corporate 'property' that there will be funds for dividends and the capital will remain unimpaired and will be increased, to the full extent to which good management and the utmost good faith can attain these ends.[90] These claims to the daily conduct of the

[86]Creditors' rights will be taken up *infra*; but just here note Taylor v. Commonwealth, 119 Ky. 731, 75 S. W. 244 (1903), and State v. Hattrem, 140 Ore. 371, 13 P. (2d) 618 (1932).

[87]See authorities cited, *supra*, notes 66, 82.

[88]The factual content of all legal relations is expected conduct. "The law functions only through human conduct, and, accordingly, it looks solely to *future* acts." KOCOUREK, *op. cit. supra* note 76, at 3. It is clear that the present substance of the claims of stockholders (and creditors) is the expectation of future conduct of the directors. They (the stockholders) presently possess no physical thing.

For that matter, property is only a complex of expected conduct. "Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it." BENTHAM, THE THEORY OF LEGISLATION (1931) 111, 112. "The essence of property is in the relations among men arising out of their relations to things." ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914) 96. And legal relations among men relate to future conduct. See KOCOUREK, *op. cit. supra* note 76, c. XVIII on "Things".

The terms "claim" and "right" herein are usually used as being synonymous. However, "right" may, in some contexts, require an extended meaning which included "claims" and "powers". See KOCOUREK, *op. cit. supra* note 76, at 21. Compare HOHFELD, *op. cit. supra* note 75, c. I, II, and introduction by Walter Wheeler Cook.

[89]BALLANTINE, *op. cit. supra* note 12, at 501; 11 FLETCHER, *op. cit. supra* note 12, c. 58, § 5318, 5321.

[90]"A business corporation is organized and carried on primarily for profit of the stockholders. The powers of the directors are to be employed for that end." BALLANTINE, *loc. cit. supra* note 89, quoting from Dodge v. Ford Motor

directors in handling the 'property' are so embracing that they are regarded as more than mere personal claims, or rights *in personam*; they are regarded as property rights, or rights *in rem*. This result is expressed in the terms that the corporate 'property' is held in trust for them or that it is their equitable property.[91]

Creditors—The claims of creditors are ordinarily mere personal claims, *i.e.*, to be paid at the proper time and place, without any claim in the nature of those of a *cestui que trust* which encompass the day-by-day management of the corporate 'property'. This situation is usually put in the terms that the corporation is not a trustee for its creditors (nor are the directors trustees for the corporate ceditors).[92] However, creditors do have many rights[93] which, in practical effect, make the corporate assets, to greater or lesser degree, their equitable property in much the same way as these assets are the equitable property of stockholders, or as the trust *res* is the equitable property of the *cestui*. For instance, the assets of a corporation representing its capital stock are a trust fund for the benefit of creditors.[94] This principle becomes actually operative upon insolvency. Since insolvency in this connection means impairment of capital,[95] it is apparent that

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Co., 204 Mich. 459, 170 N. W. 668 (1919). 11 FLETCHER, *loc. cit. supra* note 89.

[91]Corporate shares are property. BALLANTINE, *op. cit. supra* note 12, at 413; 11 FLETCHER, *op. cit. supra* note 12, c. 58, § 5096.

"A share of the capital stock of a corporation may be defined as the interest or right which the owner, who is called the 'shareholder' or 'stockholder' has in the management of the corporation and in its surplus profits, and on dissolution, in all of its assets remaining after the payment of its debts . . . . the 'right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and management of their concerns; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation'.

"It follows from the nature of a share of stock, that the owner thereof is not the owner nor entitled to the possession of any definite portion of the assets of the corporation. It is intangible—a mere right to participate—and is not capable of manual delivery." BALLANTINE, *op. cit. supra* note 12, at 413.

This does not prevent these mere rights to participate, or equitable rights, from being property rights and in effect rights *in rem*. See Walter Wheeler Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV.

[92]3 FLETCHER, *op. cit. supra* note 12, c. 11, § 849.

[93]*I.e.*, claims and powers, in this context.

[94]BALLANTINE, *op. cit. supra* note 12, at 718; 15 FLETCHER, *op. cit. supra* note 12, c. 63, § 7369.

[95]"For example, if they misappropriate any part of the capital stock (which in America is held to be a trust fund for creditors), they might be liable as trustees to the extent necessary to pay the debts. . . ." 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 849, at 161, quoting from Patterson v. Stewart, 41 Minn. 84, 90, 42 N. W. 926 (1889); 15 FLETCHER, *op. cit. supra* note 12, c. 63, § 7369, at 516, 517, n. 25.

the assets which represent capital stock are the equitable property of creditors, and any unlawful act of the directors which impairs capital is a breach of duty, a fiduciary duty, to creditors.[96] Furthermore, it seems clear that the assets of saving banks are trust funds for depositors as well as for stockholders, and the directors are treated as if trustees for both.[97] In view of legal provisions concerning licensing and control of the financial condition of insurers, of forms of policies, of rates and premiums, of payment of claims, and of business-getting methods, doubtless the assets of the other great type of savings institution, insurance companies, are trust funds for the benefit of policyholders.[98]

B. Actual Loss and Risk of Actual Loss

Fraudulent conversion requires that the conversion be to the use of the converter, or to the use of another than the 'principal', or with intent to defraud. As has been seen,[99] these expressions all mean that the 'agent' must so deal with the 'property' that his disposition of it can be compared to the servant's withdrawing himself and going away with a chattel, or to the asportation of larceny without the taking, in such wise as to work an actual loss or as to incur an unreasonable[100] risk of actual loss to the 'prin-

[96]See authorities cited, *supra*, notes 94, 95. It cannot be thought that the 'property' is not that of creditors, because title is in the corporation. Compare the property of any *cestui*. Nor is the situation changed because the directors can sell. Any agent to sell can pass title within his powers, yet the 'property' is the principal's.

[97]BALLANTINE, *op. cit. supra* note 12, at 372, 373; 3 FLETCHER, *op. cit. supra* note 12, c. 11, § 845.

[98]PATTERSON, ESSENTIALS OF INSURANCE LAW (1935) c. I; PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES (1927) c. III. Note also the general development in insurance conceptions. THE BIBLE OF LIFE INSURANCE (The American Conservation Co., Chicago, 1932); Report of the Armstrong Committee; Proceedings of the Twentieth Annual Convention of the Assn. of Life Insurance Presidents.

[99]See *supra* note 88. Risk of loss, although no actual loss, is an aspect always to be kept in mind. See KOCOUREK, *op. cit. supra* note 76, at 346, on phylactic relations. If a bailee is negligent and the chattel is damaged, he is liable in damages, although he is not guilty of conversion. Why? Is it not because such negligence prevents the fulfillment of the bailor's expectation of re-delivery in good condition? In Roberts v. State, 61 Tex. Cr. 434, 135 S. W. 144 (1911), a deed was stolen. Its value was fixed at the cost of replacement. It is stimulating to curiosity to observe that the requirement of *lucri causa* has, in some jurisdictions, been eliminated from the law of larceny; and this is another indication of the preponderance of loss to the 'owner' as the determinative factor in *theft*. 2 BISHOP, CRIMINAL LAW (9th ed. 1923) 642-647; 2 WHARTON, CRIMINAL LAW (12th ed. 1932) 1449-1455. Coffin v. United States, 162 U. S. 664 (1895); United States v. Fish, 24 Fed. 585 (C. C. N. Y. 1885); Hitchcock v. State, 47 Ohio App. 90, 190 N. E. 773 (1933); State v. Meininger, 306 Mo. 675, 268 S. W. 71 (1925); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911).

[100]The element of loss which must be present in a withdrawal of 'property' for the act to be a fraudulent conversion must be considered as of the time of the causal conduct of the defendant. If it is certain at that time that loss

cipal'. On the face of matters, it would seem that a loss of corporate 'property' would be a diminution of corporate assets. This statement is true but it does not go far enough. Suppose the alleged act of conversion was done by the sole stockholder, or by an officer with the assets of the sole stockholder or of all the stockholders, and the corporation's assets representing capital are unimpaired by it. There is no fraudulent conversion;[101] for the conversion must be of the 'property' of another or must work a loss to another. Since all claims of creditors are protected, no beneficial interests of theirs is interfered with. Nor is there interference with the beneficial interests of stockholders because they have assented, although, obviously, corporate assets are diminished. Suppose, however, the act impairs capital. Then something is converted in which others have a beneficial interest, namely: the creditors. And if there are other and non-assenting stockholders, the act does affect 'property' in which they too have an interest; and there is actual loss to them in that their expectations of dividends, either from profits or dissolution, are measurably defeated. Hence, it is accurate to say that a fraudulent conversion of corporate 'property' is the working of a loss or the incurring of unreasonable risk of loss to the factual interests of stockholders or creditors, or both, by a withdrawal of corporate 'property' in such wise that the occurrence can be analogized to, or made to fit the ancient formula of, conversion. Insofar as clear authority indicates, the withdrawal must be made by an officer or agent having 'possession', or by the directors as a board (in which capacity they have the requisite 'possession'), or by others acting with or through such an officer or agent or the board.

III. Some Persistent Forms of Corporate Mismanagement

Having now a working definition of fraudulent conversion in relation to the corporate set-up, some recurrent forms of mismanagement may now be considered. While attention might be di-

will occur, it seems obvious that the *agent* ought not to do the act. In corporate affairs, it is hard to imagine a situation in which loss is inevitable and yet the corporate director, officer, or agent cannot prevent his doing the act. This thought is important; for that the assertion is often made that corporate directors and officers must often suffer loss of corporate property however faithfully and intelligently they may act. The meaning of this assertion is that their duties often require them to incur risk of loss, not that their duties require them to incur inevitable losses. If they incur risks that are reasonable and do so in good faith (and the addition of the requirement of good faith serves only to emphasize the aspect of risk), they cannot be guilty of fraudulent conversion. But the very word "reasonable" indicates that they have opportunity to refrain from taking the risk.

[101]3 Fletcher, *op. cit. supra* note 12, c. 11, § 1103, and § 884 at 216; Taylor v. Commonwealth, 119 Ky. 731, 75 S. W. 244 (1903); State v. Hattrem, 140 Ore. 371, 13 P. (2d) 618 (1932).

rected to acts of directors or officers which are *ultra vires*, or clearly beyond the authority of the actors, or expressly prohibited, it is believed that it will be more instructive to restrict discussion to situations which have hitherto been roughly labeled authorized acts done in an unauthorized manner. In such instances, the conduct itself does not patently constitute fraudulent conversion; some extended exploration to determine loss and risk of loss is necessary. This exploration is usually made by means of the formula that intent to defraud must appear, and has to do mostly with risk to the corporation (*i.e.*, to those beneficially interested in the corporate 'property') and gain to the directors or officers. As typical forms of persistent mismanagement, the following will be considered: (1) loans of corporate funds; (2) excessive salaries; (3) purchases for the corporation at excessive figures; (4) excessive dividends; (5) dividends on watered stock and after alteration of the terms of a class or classes of stock; (6) writing insurance at too low rates or after insolvency.[102] It is seen that the first four types of conduct pertain to diminution of corporate assets in such wise that the corporate *principal* may usually be treated as if it were a natural person; but that the last two types relate more clearly to sluicing funds to one class of beneficial owners from another class of beneficial owners, a form of abuse prevalent only where the *principal* is a corporation.

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[102]That these types of conduct are the subject of persistent abuse by directors and officers may be gathered from the following: ADAMS, ECONOMICS AND BUSINESS CYCLES (1925); ADAMS, PROFITS, PROGRESS AND PROSPERITY (1927); BERLE AND MEANS, *op. cit. supra* note 23; THE BIBLE OF LIFE INSURANCE (1932) (A complete photographic reprint of the original studies and official reports of Elizur Wright, published by the American Conservation Co., Chicago); BREMER, AMERICAN BANK FAILURES (1935); DEWING, CORPORATE PROMOTIONS AND REORGNIZATIONS (1914); DEWING, THE FINANCIAL POLICY OF CORPORATIONS (3d ed. 1934); O'DONNELL, HISTORY OF LIFE INSURANCE (1936); VAN METRE, ECONOMIC HISTORY OF THE UNITED STATES (1921); WINKLER, MORGAN THE MAGNIFICENT (1930); *Annual Rep. Comm. Banks, for year ending Oct. 31, 1921*, MASS. PUB. DOC. NO. 8; *Phantom Insurance*, BEST'S INSURANCE NEWS (Sept., Oct., Nov., Dec. 1935); *Report of the Senate Committee on Banking and Currency*, 73d Cong., 2d Sess. (1934); Flynn, *Michigan Magic* (Dec. 1933) 168 HARPER'S MAGAZINE 1; THE PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP; 2 HOME FINANCE AND TAXATION (1932); 10 REPORT OF THE LEGISLATIVE INSURANCE INVESTIGATION COMMITTEE (Armstrong Committee; James McKean and Chas. E. Hughes as counsel, 1906).

THE EXERCISE OF JUDICIAL DISCRETION IN CRIMINAL PROSECUTIONS IN THE CIRCUIT COURTS OF MISSISSIPPI

J. P. Coleman

The fundamental discretionary powers of the grand jury and the petit jury are the modern culmination of the precedents of centuries. They are so strongly entrenched in our modern system of law that the intelligent observer and beginning attorney, equally with the experienced lawyer, are familiar with such practices as exercise by the proper jury of its discretionary power to indict or not to indict, to convict or to acquit, to believe a witness or not to believe him. But in the circuit courts of Mississippi discretionary powers do not rest entirely with juries. The frequent exercise of sound judicial discretion by circuit judges is so important as to justify the closest attention. Experience and careful study of the reported cases show that in numerous instances the outcome of criminal prosecutions in the circuit courts may well be said to depend on what the judge can or cannot do in applying sound judicial discretion. This field is well covered by numerous Mississippi decisions, in addition to statutory provisions now in force, but apparently it has never been the subject of a comprehensive, coherent treatise intended for the more convenient use of the bar of the state; hence this effort in that direction.

Let it be specifically stated that it is understood to be the rule that where questions of fact are submitted to the trial judge, either by agreement of the district attorney and defendant or by operation of law, his findings will not be reversed on appeal unless they are manifestly wrong. Accordingly, it is not the purpose of this work merely to enumerate instances in which findings of fact by the lower court were affirmed or reversed by the supreme court. This would be to compile a catalogue, to which the principle just stated would invariably serve as the infallible key. Limited at the outset to criminal prosecutions, the intention here is to cover only those matters, from indictment to sentence, in which the trial judge is governed solely by his own individual judgment, his own conception of the rulings which justice requires him to make; in short—sound judicial discretion.

In the course of criminal proceedings among the first questions which can be presented for disposition by the trial judge is the matter of quashing the venire. This arose in the comparatively recent case of *Quick v. State.*[1] The district attorney moved to

[1]132 Miss. 794; 96 So. 737 (1923).

quash the regular venire of fifty men and to quash the jury box, assigning the failure of the Board of Supervisors to comply with the statutes in filling the box from which the jurors were drawn. The irregularities, shown by testimony of the circuit clerk, were: (1) a large number of the persons whose names were placed in the jury box had served during the two previous years; (2) the box contained over 800 names, contrary to Section 2689, Code of 1906 (now contained in Section 2034, Mississippi Code of 1930); and (3) the names were not selected in proportion to the qualified electors in each supervisor's district. The circuit court sustained the motion to quash, and the supreme court upheld that action, laying down the rule that where irregularities in filling the jury box are so "gross and flagrant as to result in legal fraud, the judge is within his province and discretion to quash the panel and the jury box in such cases, and his action will not be disturbed."[2] It was distinctly stated, however, that "the testimony as to the nature of the violation must in fact show that a fraud has been committed, or show such flagrant violation of the jury laws as that the acts proven would constitute a fraud in law."[3]

Since *Quick v. State* is only one case, how can the attorney tell that to the satisfaction of the supreme court there has been "legal fraud" or "fraud in law"?

In *Cook v. State*,[4] the jurors for the term were drawn by the chancery clerk, the circuit clerk, and a person named Johnson (apparently the sheriff). In the drawing, these men turned the slips so that they could know beforehand the names of the jurors being selected. The chancery clerk did not deny, but frankly admitted, that he "got the ones" he wanted. The circuit clerk and Johnson also knew all about those being accepted by them through this method of personal selection. Of this the court spoke as follows:

> "We would not affirm any case, either civil or criminal, where the verdict was rendered by a jury selected as this one was, if there had been a timely challenge."[5]

Definite notice was then served of the court's application of Section 2389, Annotated Code of 1892.[6] This provided that all statutory provisions relating to listing, drawing, summoning, and impanelling juries are directory, merely. To quote further from the opinion of the court:

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[2]132 Miss. at 806, 96 So. at 738, (1923).
[3]Cook v. State, 90 Miss. 137, 43 So. 618 (1907).
[4]*Ibid.*
[5]90 Miss. 137, 151, 43 So. 618, 621.
[6]Miss. Code Ann. (1930) § 2064; Miss. Code Ann. (Hemingway, 1906) § 2718.

> "It was not intended by the Legislature, however, that fairness in the selection of jurors should not be preserved; and whenever there is an invasion of this right, and whenever unfairness in the method of securing jurors is shown to exist, a substantial right of the litigant is invaded, and this court, notwithstanding Section 2389, which is merely aimed at irregularities, and not intended to cover up deliberate violations of the law, will set aside the verdict of any jury deliberately selected in a manner that is in violation of the law, whenever there is a timely objection made by a party in either a criminal or civil proceeding."

The court then carefully qualified this position by laying down the limitation above quoted, in the *Quick* case, to the effect that the testimony must definitely show in fact that a fraud has been committed, *etc.*

The supreme court has more recently included "total departure from the prescribed definite course" as being not curable by operation of Section 2718.[7] What has been found to constitute such a total departure?

In the *Rhodman*[7a] case the county judge discharged a jury because it failed to convict an accused of the crime of retailing intoxicating liquor. He then selected eighteen names from the poll books, from among whom the jury that tried Rhodman was impanelled. The defendant moved to quash the entire panel. The judge overruled the motion and in so doing put into the record a statement of the high motives which prompted his selection of the handpicked eighteen. The supreme court held that this action of the county judge was without authority of law, that it was squarely in the face of jury laws.

> "The action of the court complained of was a total departure from our statutes prescribing the manner of selecting, summoning and impanelling the juries."[8]

In the *Morrison*[8a] case the sheriff, prior to the trial, transferred eight jurors from the fourth week list, at which the trial was actually had, to second week service. Then he made his own selections to fill the vacancies which he had caused for the fourth week. The conviction was reversed on the ground that the sheriff's action

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[7]Morrison v. State, 155 Miss. 323, 124 So. 362 (1929); Rhodman v. State, 153 Miss. 15, 120 So. 201 (1929).

[7a]153 Miss. 15, 120 So. 201 (1929).

[8]153 Miss. 15, 22, 120 So. 201, 202, 203. Under the County Court Act (1926), the practice, procedure and the manner of selecting, summoning, and impanelling juries for the county court in criminal cases are the same as provided by law for the circuit courts.

[8a]155 Miss. 323, 124 So. 362 (1929).

was a "purposeful and intentional departure from the fundamental requirements of the statutes." This decision was expressly based on the *Cook* and *Rhodman* decisions.

It certainly should not be overlooked that in those trials where the circuit court denies the motion to quash the venire, defendants will encounter a long line of decisions (based on Section 2718) which have followed *Simmons v. State.*[9] Here it was held that in view of the provisions of Section 2718, even if there were irregularities in listing and selecting the jury, the defendant cannot appeal from a refusal to quash the venire unless he can show that as a result of the irregularities he was not given a trial by a fair and impartial jury. Justice Sam C. Cook vigorously dissented, saying that the majority opinion was "going some", but an impressive collection of decisions have since followed the theory announced in the *Simmons* case.[10]

Examples of irregularities held not reversible on appeal are:

(1) The minutes of the Board of Supervisors showed that all of the names were drawn from District 1 of the County—*Simmons v. State.*

(2) The Board of Supervisors failed to select the names in proportion to the qualified electors in each district—*Atkinson v. State.*[10a]

Thus it appears that the circuit judge can quash the venire, without likelihood of reversal, as long as there is no manifest abuse of sound judicial discretion in finding that a fraud has been committed, or that, from the facts shown, the jury laws were so flagrantly violated as to constitute a fraud in law or a total departure from the manner prescribed in the Code. This proposition works fine so long as it is the district attorney who is making the motion, but for the defense the problem is the matter of persuading the judge to exercise judicial discretion in favor of quashing; otherwise the appellant is most likely to encounter unsuccessfully the rule announced in *Simmons v. State.* Of course, if the facts warrant, he can always advance strong argument, based on the *Cook, Morrison* and *Rhodman* cases, to the effect that the violations were more than mere irregularities.

The discretion of the court very largely controls the granting of continuances. Where a continuance is denied, manifest abuse

[9]109 Miss. 605; 68 So. 913 (1913).

[10]Ferguson v. State, 107 Miss. 559, 65 So. 584 (1914); McVey v. State, 117 Miss. 243, 78 So. 150 (1918); Atkinson v. State, 137 Miss. 42, 101 So. 490 (1924); Harris v. State, 155 Miss. 794, 125 So. 253 (1929); Sullivan v. State, 155 Miss. 629, 125 So. 115 (1929).

[10a]137 Miss. 42, 101 So. 490 (1924).

of the discretion is the only ground that will secure a reversal.[11] In criminal prosecutions such reversals are most rare. Each case of this type has to be decided in the light of its own particular facts, and for the reason that the circuit judge is in better position to decide whether or not the defendant will be prejudiced by refusal of the motion for continuance, the rule has been repeatedly announced and adhered to by the supreme court.

In general, prosecutions must be begun and carried on in the county in which the crime is alleged to have been committed,[12] but the venue may be changed.[13] Applications for change of venue are addressed to the sound discretion of the court, and the denial of a change is not reversible error unless it appears from the record that the court either acted unfairly or palpably abused its discretion.

The decision in the leading case of *Weeks v. State*[14] and a long line of subsequent Mississippi cases have strongly established this principle in our state.

The explanation appears to be rather easy to reach, in the light of the general rule upholding the sanctity of findings of fact by trial judges. Each application for change of venue calls for a finding of facts. From the testimony of witnesses or affidavits presented for the purpose the circuit judge must find whether prejudgment of the case, or grudge, or ill-will to the defendant in the public mind, exists to such an extent that the defendant cannot have a fair and impartial trial in the county where the offense is charged to have been committed. These grounds are set forth in the statutes,[15] and the supreme court has held that these are the only grounds available.[16]

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[11]McDaniel v. State, 8 S. & M. 401 (1847); Ogle v. State, 33 Miss. 383 (1857); Lipscomb v. State, 25 So. 158 (Miss. 1899); Williams v. State, 92 Miss. 70, 45 So. 146 (1908); Cox v. State, 138 Miss. 370, 103 So. 129 (1925); Jones v. State, 168 Miss. 702, 152 So. 479 (1934); Hodgkins v. State, 172 Miss. 297, 160 So. 562 (1935).

[12]Miss. Code Ann. (1930) § 1176.

[13]*Id.* § 1265.

[14]Weeks v. State, 31 Miss. 490 (1856); Stewart v. State, 50 Miss. 587 (1874); Cavanah v. State, 56 Miss. 299 (1879); Dillard v. State, 58 Miss. 368 (1880); Bishop v. State, 62 Miss. 289 (1884); Peoples v. State, 33 So. 289 (Miss. 1903); Regan v. State, 87 Miss. 422, 39 So. 1002 (1906); Walden v. State, 129 Miss. 686, 92 So. 820 (1922); Long v. State, 133 Miss. 33, 96 So. 740 (1923); Jones v. State, 133 Miss. 684, 98 So. 150 (1923); Mackie v. State, 138 Miss. 740, 103 So. 379 (1925); Dalton v. State, 141 Miss. 841, 105 So. 784 (1925); Richardson v. State, 153 Miss. 654, 121 So. 284 (1929); Shelton v. State, 156 Miss. 612, 125 So. 390 (1930); Wexler v. State, 167 Miss. 464, 142 So. 308 (1933); Myers v. State, 167 Miss. 76, 147 So. 308 (1933).

[15]Miss. Code Ann. (1930) § 1265.

[16]Long v. State, 133 Miss. 33, 96 So. 740 (1923).

It is true that there have been several cases in which the supreme court held that the circuit judges erred in refusing change of venue.[17] Where the supreme court definitely disagrees with the circuit judge as to what the facts show, then it is always able to apply the exception as to the lower court's having acted unfairly or palpably abused its discretion.

Where one pleads guilty to an offense and files a motion to withdraw the plea before sentence, it is within the discretion of the court to grant or deny the motion. It is not error to refuse such a motion where there is no showing that the accused is not guilty of the crime, and the motion must also set forth the defense expected to be made.[18]

One instance wherein the circuit judge has been reversed in the denial of a motion for the withdrawal of a plea of not guilty is seen in the case of *DeLoach v. State*.[19] Hardy DeLoach pleaded guilty to burglary and subsequently, at the same term of court, submitted his application to withdraw the plea of guilty and stand trial. He submitted his own affidavit of his innocence, and the court heard testimony on both sides, some to the effect that the defendant was insane and feeble-minded; the other that he was a shrewd rascal, after which the application was denied and the defendant sentenced to the penitentiary. The supreme court said, in reversing the lower court, that this was a "matter within the discretion of the court, but a judicial discretion should always be exercised in favor of innocence and liberty," further saying that a defendant ought to be allowed to withdraw his plea of guilty when unadvisedly given, if there is a reasonable ground for going to the jury. The attorney undertaking a motion for this purpose should therefore look carefully to the problem of establishing a reasonable ground for going to the jury. The decision of the *DeLoach* case appears to be a definite modification of, or exception to, the general rule, as the Attorney General in his brief relied on the rule as announced in previous cases.

It is believed that the general rule on the subject in Mississippi is well and clearly stated in the words of presiding Justice Etheridge, in *McDonald v. State*,[20] decided more recently than any of the above mentioned decisions:

[17]Saffold v. State, 76 Miss. 258, 24 So. 314 (1898); Tennison v. State, 79 Miss. 708, 31 So. 421 (1901); Owens v. State, 82 Miss. 31, 33 So. 722 (1903); Brown v. State, 83 Miss. 645, 36 So. 73 (1904); Anderson v. State, 92 Miss. 656, 46 So. 65 (1908); Magness v. State, 103 Miss. 30, 60 So. 8 (1912); Eddins v. State, 110 Miss. 780, 70 So. 898 (1916); Keeton v. State, 132 Miss. 732, 96 So. 179 (1923).

[18]Mastronada v. State, 60 Miss. 86 (1882); Purvis v. State, 71 Miss. 706, 14 So. 268 (1894); Fortenberry v. State, 147 Miss. 91, 113 So. 193 (1927).

[19]77 Miss. 691, 27 So. 645 (1900).

[20]151 Miss. 568, 118 So. 628 (1928).

> "Where pleas of guilty are entered, it is usually in the legal discretion of the trial judge to set aside, or refuse to set aside, a plea of guilty and enter a plea of not guilty, and this court will only reverse the action of the trial judge where it appears that he has manifestly abused this legal discretion."[20a]

A motion for severance, where persons are jointly indicted for a misdemeanor, is always addressed to the sound discretion of the trial judge.[21] It is mandatory upon the judge to grant a severance where the application is made by a person jointly indicted for a felony.[22]

The attorney interested in the discretionary powers of the circuit judge to amend the statements of an indictment so as to avoid variance should study carefully Section 1289 of the Mississippi Code of 1930. There he will find the carefully stated statutory provisions on this subject, together with the regular Code annotations, the repetition of which at this point would constitute an unnecessary consumption of space.

In like manner, for Code provisions as to the authority of the circuit court, in its discretion, to order a trial to proceed in the absence of the defendant in certain cases, reference should be made to Section 1276, Mississippi Code of 1930.

Section 26 of the Constitution of the State of Mississippi provides that all criminal trials, except for a few therein expressly designated, shall be public. This places on the circuit judge the function of controlling the conduct of spectators or bystanders present at the trial. There is always the possibility that the conduct of an audience at a trial, in active manifestation of applause or disapproval, may influence a jury or some of its members to the prejudice of the defendant. Therefore, the circuit judge, in his discretionary control of the audience, is the only protection against the courtroom demonstrations of persons unfriendly to the defendant.

In the case of *State v. Floyd*,[23] the defendant was convicted of assault and battery with intent to kill and murder his wife. The audience applauded when the state announced it would accept the jury. The judge admonished the audience, and there was no motion to discharge the jury or continue the case because of this act of the audience. Of this the supreme court said: "As

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[20a]McDonald v. State, 151 Miss. 568, 570, 118 So. 628, 629 (1928).
[21]Wall v. State, 51 Miss. 396 (1875); MISS. CODE ANN. (1930) § 1272.
[22]MISS. CODE ANN. (1930) § 1271.
[23]166 Miss. 15, 148 So. 226 (1933).

long as an audience does not disturb or prevent a fair trial, we cannot control the lower court in its discretion and tell it when to exercise authority and when not. It is only when it is evident that such authority should be exercised, and it is not, that this court will interfere. The record does not show error in this respect on the part of the court below."[24]

This was in 1933, before the decision in the case of *Dean v. State*.[25] In that case the affidavits of defendant on motion for a new trial averred that the courthouse was greatly crowded with spectators almost daily; that on several occasions the audience applauded when the state made a point, or booed and hissed at things said or done in behalf of defendant. The judge would rap for order and reprimand the audience, but did nothing more. He did not admonish the jury. However, no request was made of the judge that he do other than he did. There was no objection from the defense, nor motion for a mistrial. The point was raised for the first time on the motion for a new trial.

Justice Griffith used approximately two and a half pages in a clear discussion of the conduct of the audience. The essence of this is that it is the trial judge's duty at the first outbreak of demonstrations by the audience to:

(1) Immediately restore order;

(2) Admonish the audience of the gross impropriety;

(3) Give distinct warning that a repetition will be punished;

(4) Admonish the jury, speaking to them directly, so as to be heard by the audience, that their duties are to decide upon the law and evidence, wholly disregarding the demonstrations of the audience;

(5) Upon repetition of the offense, all offenders should be fined and committed until paid, or fine suspended on the condition that the offender remain away from the courthouse during the remainder of the term. Or, the judge can order the courtroom cleared of all, save those who have had no part in the misconduct;

(6) Upon the repetition of any manifestation, the judge should again admonish the jury and ask them if any one of them will in the slightest be influenced by the misbehaviour which has occurred.

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[24]Id. at 40, 148 So. at 232.
[25]173 Miss. 254, 160 So. 584 (1935).

It is felt that the following language of Justice Griffith is also of particular importance:

> "All the aforementioned duties as to good order, and in respect thereof to see that the parties are furnished an impartial and uninfluenced trial, are upon the judge to be performed of his own motion. It is not the duty of any litigant to look after the keeping of order in court."[26]

He then lays down the rule, however, that the party must object and properly move the court at the time of the demonstrations if he is to secure a new trial or reversal for the refusal thereof. Two propositions were given as possible exceptions to this rule, but were expressly stated as not being decided in that opinion.[26a]

The court was evenly divided in this case, but the opinion of the three dissenting justices makes no criticism of the statements of the prevailing opinion as to rules applicable to the conduct of audiences.

Apparently the first Mississippi case, in point of time, directly touching on this subject was *Raines v. State*.[27] Judge Terral, in delivering the opinion of the court, made some very valuable and applicable observations on the conduct of audiences at criminal trials, but this exact issue was evaded by the reversal of the conviction on other grounds.

Later, the case of *Smith v. State*[28] was one in which the Chief Justice in his dissenting opinion said that, "It was a trial by the audience, not a trial by the court and jury. It was a crucifixion of Justice in her own Temple." Yet the majority opinion said, "We cannot say that the defendant was prejudiced by this conduct of the audience." So, the defendant always faces the possibility that even our highest court may disagree as to the effect of audience conduct upon the fairness of his trial.

Certainly it is the duty of defense attorneys to be alert in effectively calling the attention of the judge to any infractions of this kind. He owes that assistance to both court and client. Besides, it would seem that incidents of this type are more likely of actual correction immediately at the time they occur rather than on appeal. This is just another of the many situations dealt with

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[26] *Id.* at 283, 160 So. at 589.

[26a] 173 Miss. at 285, 286, 160 So. at 589.

[27] 81 Miss. 489, 33 So. 19 (1902).

[28] 95 Miss. 786, 49 So. 945, (1909) 27 L. R. A. (N. S.) 461,

in this article which require the earnest intelligent efforts of the attorney to assist the judge in arriving at the proper decision or taking appropriate action within the scope of his discretionary powers.

A most significant feature of the criminal trial is the selection and organization of the particular jury which is to determine the innocence or guilt of the accused. Under a jury system wherein the verdict must be the unanimous decision of twelve men, the circuit judge is making a grave decision every time he passes on an objection to a juror for cause. One member of a panel can cause a mistrial through disagreement. The possibility is ever present that by various means a minority of the jurors can bring about any result they desire. The reasons which lead an individual thus to act when cloaked with the solemn responsibility of a juror could only be enumerated by searching the whole field of human experience and behaviour. Hence, the function of the judge in accepting or rejecting jurors challenged for cause, affecting their giving the accused a fair trial, is really a superhuman task imposed by law upon the operation of a very human institution.

One of our oldest Mississippi cases, which shows that at the very earliest our courts had due regard for the selection of a fair jury, is *McGuire v. State*.[29] The defendant was indicted and convicted in the Circuit Court of Lafayette County on a charge of unlawfully selling spirituous liquors in less quantity than five gallons, within five miles of the University of Mississippi. After the jury had been impanelled and sworn, the district attorney objected to one of the jurors because several indictments were pending against him for retailing spirituous liquors. The court sustained the objection and set aside the juror, to which the defendant accepted. On this point the following is quoted from the decision of the High Court of Errors and Appeals:

> "It is held by this court, that the court below has the power to set aside a juror, without challenge by either party. Lewis v. State, 9 S. & M. 115. This is upon the ground that it is the duty of the court to see that an impartial jury is impanelled, composed of men above all exception. Upon the same principle, it is laid down that after a juror has been sworn and taken his seat, if it be discovered that he is incompetent to serve, the court in the exercise of

[29] 37 Miss. 369 (1859).

sound discretion may set him aside, at any time before the evidence is given."[30]

The action of the lower court was affirmed. This holding received the approval of the supreme court in 1870, of which latter opinion a portion is here quoted because of its clearness of statement and definite applicability:

"It is the duty of the Court to superintend the selection of the jury, in order that it may be composed of fit persons; large discretion must be confided to the court in the performance of this duty; nor will the action of the circuit court in this behalf be the subject of review here, unless some violation of law is involved, or a gross and injurious exercise of discretion is shown. The primary object is to insure a fair, unbiased jury."[31]

A juror who has not been challenged by either party may be set aside by the court, and a juror already sworn may be discharged from the panel (before the testimony is introduced) upon the discovery that he is incompetent to serve. This is permissible because it does not deprive a party of a legal right, and it may and ought to be done to secure an impartial trial.[32] The following language of this decision is thought to be particularly in point:

"Large discretion should be indulged to the court, in any course taken by him, within the pale of the law. .... Control over the selection of jurors is committed very much to the discretion of the court."[33]

In the case of *State v. Jefferson*[34] the jury had been impanelled and sworn to try the case. The indictment was being read to the jury, when a juror rose and stated that it then occurred to him for the first time that he was a member of the grand jury which returned the indictment. It was held to be within the discretion of the court to have the juror stand aside and substitute another in his stead.

Objections to jurors based on conscientious scruples have been said to assume the shape of a challenge on the part of the prosecution, but the court may set aside the juror of its own motion.[35]

[30]In this connection see Sullivan v. State, *supra* note 10; Mabry v. State, 71 Miss. 716, 14 So. 267 (1894).

[31]Head v. State, 44 Miss. 731 (1870).

[32]Gilliam v. Brown, 43 Miss. 641 (1870) [Assumpsit, but the opinion is based on Lewis v. State, 9 S. & M. 115 (1847); Williams v. State, 32 Miss. 389 (1856); and McGuire v. State, 37 Miss. 369 (1859)].

[33]43 Miss. 641, at 652 (1870).

[34]52 Miss. 767 (1876).

[35]Williams v. State, 32 Miss. 389 (1856).

Practically the same had already been said of the discretionary power to excuse for incompetency.[36]

A juror believed by the court to be intoxicated can be set aside by the judge of his own motion.[37]

Where a juror in a criminal case admitted that he was friendly with the boys on trial and sympathized with them, the trial judge was held to be within the limits of his discretion in setting the juror aside.[38]

It is believed that the following, as recently announced, can be applied in any situation where there is question of the fairness of a juror:

> "The judge has sufficient authority, under the power given him, to excuse any juror, who, in his opinion, based upon reasonable grounds, cannot or will not try the case fairly."[39]

Thus, with the help of such facts as are elicited by the attorneys, or perhaps learned from his own inquiries, the judge, invested with broad powers of discretion, must tread along the often dim and shifting borderline which separates fairness from prejudice. Each juror is in this respect a problem to himself, and the responsibility of the judge is as great as to one as to any other.

The general rule is that a defendant is entitled to confer alone with his witnesses, yet it has been held that where the witnesses were children of tender years and afraid of the defendant the trial court rightfully exercised the discretion of making an exception and requiring that someone friendly to the children be present at the conference.[40]

The verdict reached in numerous cases is the result of the testimony of children, and the competency of a child to testify is a question of fact primarily addressed to the sound discretion of the trial court.[41]

In the case of *Smith and Cavin v. State*,[42] upon the motion of the district attorney the witnesses were put under the rule, that is, they were sent from the courtroom to some other room or place

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[36]Mabry v. State, 71 Miss. 716, 14 So. 267 (1894).
[37]Guice v. State, 60 Miss. 714 (1883).
[38]Smith and Cavin v. State, 61 Miss. 754 (1884).
[39]Bruce v. State, 169 Miss. 355, 152 So. 490 (1934).
[40]Mackie v. State, 138 Miss. 740, 103 So. 379 (1925).
[41]Peters v. State, 106 Miss. 333, 63 So. 666 (1913); Edwards v. Cash, 156 Miss. 507, 126 So. 33 (1930).
[42]Smith and Cavin v. State, 61 Miss. 754 (1884).

beyond the hearing of the court. One man, who was jointly indicted with the defendants on trial, was permitted by the judge to remain in the courtroom and later to testify, although the attorneys for the defense had asked for his exclusion. The supreme court tersely ruled that permitting a witness to be examined who remained in the room while all the others are under the rule is a matter wholly within the discretion of the judge and cannot be assigned as error. The opinion stated that this had been several times decided by the court, but no citations were given. Bishop's *Criminal Procedure* had made its appearance almost twenty years before the date of this decision, and that authority had strongly upheld the discretionary power of the judge in the exclusion of witnesses.[43] The opinion did not cite Bishop but the attorney general cited him in his brief.

The circuit judge has the right to interrogate witnesses whenever in his discretion he feels that it is necessary or proper for him to do so.[44] The supreme court has suggested that the judge should not be over ready in his questioning and should be on guard so as not to "indicate to the jury" any opinion as to how the disputed facts are to be decided. There must be clear abuse of the discretion before the supreme court will review it.[45]

During the interrogation of witnesses by counsel the court can intervene to stop undue repetition and immaterial inquiries.[46]

Whether evidence will be allowed in rebuttal which might have been offered in chief, or whether a case shall be reopened for the introduction of further evidence, is within the discretionary control of the court.[47]

By statutory provision and subsequent decisions of the supreme court it is entirely within the discretion of the circuit judge to allow or refuse a view by the jury of the premises where a crime is alleged to have occurred.[48]

It is not within the province of the trial judge to give an instruction to the jury, unless such instruction is requested by one of the parties and presented to the court in writing. It is not within

[43]BISHOP, CRIMINAL PROCEDURE (2d ed. 1913) § 1086, *et seq.*

[44]Griffin v. State, 171 Miss. 70, 156 So. 652 (1934).

[45]*Id.* at 73, 156 So. at 652.

[46]*Id.* at 74, 75, 156 So. at 653.

[47]Morris v. State, 148 Miss. 680, 114 So. 750 (1900); State v. Martin, 102 Miss. 165, 59 So. 7 (1912); Baird v. State, 146 Miss. 547, 112 So. 705 (1927); Roney v. State, 167 Miss. 827, 150 So. 774 (1933); Ill. Cent. R. R. v. Brown, 149 Miss. 42, 115 So. 115 (1928); Stevens v. Locke, 156 Miss. 182, 125 So. 529 (1930); White v. Weitz, 169 Miss. 102, 152 So. 484 (1934).

[48]MISS. CODE ANN. (1930) § 2066; McPherson v. State, 124 Miss. 361, 86 So. 854 (1921); Bailey v. State, 147 Miss. 428, 112 So. 594 (1927).

the discretionary power of the court to give an instruction on his own initiative.[49] Thus, in a prosecution for murder it is reversible error for the trial judge to accede to the request of the jury for oral instructions as to whether it can convict of manslaughter, the state and the accused not having consented to it.[50]

Only two counsel to the side shall be heard in criminal cases, unless the court, for special reason, in its discretion, sees fit to allow a larger number.[51]

The question of discretionary control of how long the jury will be kept in deliberation gave rise to many controversies, and the supreme court finally decided to formulate a general rule covering the subject,[52] which is as follows:

> "(a) It shall be within the sound judicial discretion of the trial judge as to how long he will keep the jury in deliberation, and his discretion shall not be reviewed on appeal, unless there has been a clear abuse of it. And this discretion shall apply to deliberations carried over from Saturday until Monday, the review on appeal in such case, however, being the more watchful than in those relating to other periods.
>
> "(b) The length of time during which he will hold the jury in deliberation being the prerogative solely of the trial judge, and a matter concerning which it is absolutely nobody else's business, he shall not state to the jury, either expressly or by an act or language which reasonably construed will carry an implication, how long he intends to keep them; nor shall he make any such statement outside of the hearing of the jury, which is carried to them by any other officer of the court."

In misdemeanor cases the court may suspend a sentence, suspend the execution of a sentence, or any part of the sentence, on such terms as he may see fit to impose.[53]

When satisfied that a defendant found guilty of a felony not capital is not more than sixteen years of age, the court, in its

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[49]James v. State, 106 Miss. 353, 63 So. 669 (1913); Johnson v. State, 106 Miss. 94, 63 So. 338 (1913).

[50]Gilbert v. State, 78 Miss. 300, 29 So. 477 (1901); Simmons v. State, 107 Miss. 466, 65 So. 512 (1914); Westbrook v. State, 174 Miss. 52, 163 So. 838 (1935); MISS. CODE ANN. (1930) § 586.

[51]MISS. CODE ANN. (1930) § 1278.

[52]155 Miss. 648, 124 So. 803 (1929).

[53]MISS. CODE ANN. (1930) § 1298.

discretion, may sentence the prisoner to the county jail for one year or less instead of sentencing him to the penitentiary.[54]

Any sentence within the limitations of the statute is within the discretion of the trial court and is not reviewable on appeal.[55] The exercise of the court's discretion in imposing the maximum penalty is not illegal, even if the court is influenced by information received outside the trial.[56]

The foregoing, as announced in the beginning, constitutes the results of earnest inquiry into the numerous situations with which attorneys are faced during the course of criminal prosecutions in the circuit courts of this state and which are disposed of through the exercise of judicial discretion by our circuit judges. No leaf has been left unturned in the attempt to make this a complete survey of the ground as it is found to now exist, but the writer would be the last to lay claim to supernatural gifts of infallibility.

It would no doubt be of value to follow the subject to its farthest limits by going into comparisons of the discretionary powers exercised here with those of other jurisdictions within the United States. Possibly it would have been better to have penetrated to greater depts as to the reason for and effect of any of these various powers. A study of the application of each in the various circuit court districts would likely be of great interest, especially to those blessed with more pronounced statistical inclination. Proposed improvements, by way of specific additions to or restrictions upon existing powers, are entitled to careful consideration in the interest of the betterment of our system of criminal justice. Perhaps each of the phases mentioned will yet have adequate treatment in its own right, but the uppermost intention at present has been to accomplish a coherent, comprehensive exposition of the principles as now established. The usual limitations would hardly permit of more. Because of the purpose with which the article was begun it has not been considered advisable or possible to make it comply in every respect with the commonly accepted requirements of the standard law review article. Yet, if it comes to be of practical service to the legal profession in Mississippi, the undertaking will have received more than adequate reward.

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[54]MISS. CODE ANN. (1930) § 1294.
[55]Harris v. State, 142 Miss. 342, 107 So. 372 (1926).
[56]Donald v. State, 41 So. 4 (Miss. 1906).

HOMESTEAD TAX EXEMPTION IN MISSISSIPPI

*Roscoe Arant**

Homestead tax exemption in Mississippi is part of a movement that had its inception in the depression of the early years of the present decade. This movement has found expression in some form of tax reduction on homesteads in no less than thirteen states[1] representing practically every part of the nation.[2]

The policy of deliberate exemption of selected classes of property from the tax rolls dates from the beginning of the general property tax.[3] These exemptions have developed in four or five main directions or movements, in practically every state. For example, the properties of eleemosynary institutions, such as hospitals, churches, schools, libraries, and fraternal orders, have always been granted exemption from taxation.[4] The exemptions were usually allowed on the theory (1) that they were not income producing properties, and (2) that they performed a type of social service that should probably be paid for by the state from taxes, were they not supported from private contributions.[5] A second group of properties that have occasionally been granted tax exemption are new industries which states or local governments, for various reasons, desired to attract into their particular jurisdictions.[6] But generally, in those cases, the concession was only temporary, the idea usually being that within a few years the industry

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[1]Alabama, Arkansas, Florida, Georgia, Louisiana, Minnesota, Mississippi, North Carolina, Oklahoma, Texas, Utah, West Virginia, and Vermont.

[2]For a review of the legislative history of the subject, see Bloomenthal, *Tax Exemptions—Pt. 2: Homestead Exemptions* (1937) 15 TAX MAG. 398, 463, 527; Manning, *State Tax Legislation—1938* (1938) 16 TAX MAG. 721, 737; May, *The Status of Homestead Tax Exemption in the United States* (1937) 13 J. OF LAND & PUB. UTIL. ECON. 130.

[3]*Cf.* Martin, *Social Aspects of Tax Exemption* (1936) ANNALS 48.

[4]Exemption of the above listed properties were in existence even during Mississippi's territorial period. Miss. Terr. Stat. (1816) 416, Act of Dec. 27, 1815. Present statute on exemption is MISS. CODE ANN. (1930) § 1308 as *am'd.* by Miss. Laws (1934) c. 157, and Miss. Laws (Ex. Sess. 1935) c. 23.

[5]This is indicated by the usual judicial holding that a statute on exemption for charitable organizations will not apply to foreign organizations. Layman Foundation v. Louisville, 232 Ky. 259, 22 S. W. (2d) 622 (1929); Ferguson v. Townsend, 111 W. Va. 432, 162 S. E. 490 (1932); (1932) U. OF PA. L. REV. 1168.

[6]MISS. CONST. (1890) §§ 182, 192; MISS. CODE ANN. (1930) § 3109 as *am'd.* Miss. Laws (Ex. Sess. 1938) c. 76. This class of exemption is well illustrated by the exemption accorded to industry by Mississippi under the "Balance Agriculture with Industry" program sponsored by Governor White for the purpose of attracting manufacturing industry into the state. Miss. Laws (1st Ex. Sess. 1936) c. 1.

would have developed into a definite source of revenue and then be transferred from the exempted to the taxed classes of property. A third class of property which has often been accorded a sort of *de facto* exemption, mainly within agricultural states, has been the crops[7] and live stock[8] of farmers. The process of granting this exemption has usually been to fix the assessment dates after crops were harvested and marketed, and to provide that the property tax should not apply to crops still in the field.

Still another direction in which the *de jure* process of exemption has developed in most states is that of such tangible personal properties as household equipment. In agricultural states in particular, this phase of exemption has frequently been extended to mechanics' tools,[9] farmers' equipment,[10] and other instrumentalities of mechanics' and farmers' incomes. In Mississippi, this line of development began about 1870[11] with the exemption of a limited number of items as exceptions to the general property tax which was adopted in that year, but it has been periodically increased until at the present time it includes practically all personal property owned by the average individual.[12]

But in none of these phases of property exemption has the policy been extended to such large blocks of the tax base as in the present movement for homestead exemption. The foreshadows of this movement extend back to the tax-exemption method of granting "bonuses" to ex-soldiers, and to the attempt to relieve the housing shortage following the World War when certain states granted partial and temporary exemption to new dwelling houses constructed.

In Massachusetts,[13] for example, a consideration is allowed to soldiers and sailors (and their widows) of the Civil War, the Spanish War, the Phillipine Insurrection, and the World War in the form of a $2000 exemption from taxation. This exemption is granted, however, only to veterans who are disabled by reason of military or naval service. A similar exemption is allowed in Michigan[14] under somewhat more restricted conditions, including maximum age re-

[7]MISS. CODE ANN. (1930) § 3108 (i), as *am'd.* Miss. Laws (1934) c. 157 (j).

[8]MISS. CODE ANN. (1930) § 3108 (m), (n), (o), (u), as *am'd.* Miss. Laws (Ex. Sess. 1935) c. 23 (e), (f), (g).

[9]MISS. CODE ANN. (1930) § 3108 (t).

[10]MISS. CODE ANN. (1930) § 3108 (p), as *am'd.* Miss. Laws (1934) c. 157 (q), and Miss. Laws (Ex. Sess. 1935) c. 23 (h).

[11]MISS. REV. CODE (1871) § 1662.

[12]MISS. CODE ANN. (1930) § 3108 as *am'd.* Miss. Laws (1934) c. 157, and Miss. Laws (Ex. Sess. 1935) c. 23.

[13]Mass. Gen. Laws (1921) c. 59.

[14]MICH. COMPILED LAWS (1929) § 3395, as *am'd.* Pub. Acts (1933) Act. 243.

strictions, than those of Massachusetts. This early variety of "soldiers bonus" legislation was conservative enough to place certain bars of age, income, property ownership, and other conditions to the application for exemption. In Oklahoma[15] service in the Spanish War, Civil War, or World War is sufficient for a $200 increase in the normal property tax exemption for resident heads of families. In Mississippi there has been no legislation enacted granting such special exemption to soldiers as the foregoing instances.[16] Nevertheless those cases do serve to illustrate one source, or outskirt of the present movement for homestead exemption.

A second foreshadowing of this movement is found in the temporary exemptions of new dwellings allowed by some states to relieve the housing shortage following the World War. The most familiar example of this phase was that of New York City. In that emergency the legislature of the state added a new section to the tax law, which permitted any city in the state to exempt all one- and two-family residences, and multi-family dwellings begun within a stipulated period, exemptions to expire in 1932, and to be limited in the case of multi-family dwellings, to a maximum per apartment.[17] New York City was the only municipality in the state which made use of this act. In appraising the results of this exemption, the President's Conference on Home Building and Home Ownership in 1932 said of it:

> "While it is probable that the measure was a factor in breaking the deadlock, it is difficult to measure the exact extent of its influence in this direction. Certainly the savings in taxes for a period of years gave the new buildings an advantage over existing buildings, which increased the safety of investments in the second mortgages on them. If this be conceded, however, it follows that little, if any, of the advantage of tax exemption was passed on to the purchaser or to the tenant. Furthermore, the rapid adjustment of general conditions to the new price levels proved sufficient to break the building deadlock in other parts of the New York Metropolitan district with-

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[15]Okla. Stat. (1931) § 12319.

[16]It is not intended here to cite every instance of this kind of exemption. Those used are for illustrative purposes only. For competent discussion of the various types of exemptions and their legal aspects, see Baker, *Tax Exemption Statutes* (1928) 7 TEX L. REV. 50; *id.*, *Judicial Interpretation of Tax Exemption Statutes* (1929) 7 TEX. L. REV. 385; *id.*, *Some Questions Raised in the Field of Tax Exemption* (1930) 8 TEX. L. REV. 196. See also, Bloomenthal, *Tax Exemptions* (1937) 15 TAX MAG. 269, 398, 463, 527, 658; (1938) 16 TAX MAG. 27, 274.

[17]N. Y. Laws (1920) c. 949 as *am'd.* N. Y. Laws (1922) c. 281 and N. Y. Laws (1923) c. 337.

> out resort to this form of tax exemption . . . . Considered as an emergency measure designed to meet a critical situation, the law under consideration probably served a useful purpose, although this is debatable in view of the paucity of evidence. In the absence of a critical shortage of housing, nothing can be said for such exemption."[18]

In short, when the states launched into the current practice of exempting homesteads from property taxation, though there had been considerable experience in property exemption other than homesteads, the experience had not been of such character as to furnish a sound basis for reliable judgment in forming homestead exemption policies. Consequently, in its present stage of development this movement should be still regarded as only an experiment. States should not too hastily assume that it has become a permanent part of their program. The State of Mississippi is probably wise in not incorporating homestead exemption into its constitution as certain other states have done.[19] It is as yet only a newcomer in public policy, and because of its possible magnitude it should be ragarded with the utmost skepticism until it has proved its merits and it has become certain that its acquisition will confer a net social benefit, and not an additional encumbrance upon the state and its fiscal system. With this caution in mind, the purpose of this paper, therefore, is to outline briefly the homestead exemption legislation of the State of Mississippi, present a statistical analysis of a cross section of its past operation, indicate some of the economic considerations that should be taken into account, and offer suggestions looking to the solution of certain major problems which it involves.

Mississippi was one of the first five states to adopt homestead tax exemption. In 1933 Texas[20] and Oklahoma[21] each adopted constitutional amendments providing for the exemption of residence homesteads from the *ad valorem* tax of the state. The fol-

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[18]THE PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, 2 HOME FINANCE AND TAXATION (1932) 128, 129.

[19]Governor White, in his message, cautioned: "It was my first thought that the principle of tax free homes should be made fixed and practically irrevocable through incorporation in an amendment to the State Constitution. I am fully convinced that such an amendment would carry by an overwhelming vote, should you submit it to the people. But on further consideration, *I am satisfied that it would be neither wise nor proper thus to tie the hands and hamper the action of future legislatures.*" (Italics mine). Governor's Message, July 6, 1938.

[20]TEX. CONST. (1933) art. 8, ¶ 1-A.

[21]OKLA. CONST. (1933) art. 10, ¶ 9.

lowing year Louisiana,[22] Florida,[23] and Mississippi[24] joined the movement, Louisiana and Florida through constitutional amendment and Mississippi by statutory provision only.

The Mississippi statute of 1934 provided for an exemption of homesteads up to $1000 of assessed value, the homestead in question not to exceed forty acres in area. The exemption applied only to the state levy, and the claimant taxpayer was required to be a resident of the State of Mississippi.[25] In 1935 the statute was amended so as to increase the maximum exemption to $2,500 assessed value, and the quantity of land to an area not greater than 160 acres—the exemption, as in 1934, applying to only the state levy.[26] In 1938, however, Governor White recommended to the extraordinary session of the legislature an increase in the exemption to include all levies, both state and local, (even including municipal levies), for ordinary governmental purposes, without limit to assessed valuation, although he did suggest an 80-acre limit in area for rural homestead purposes. The law as enacted was more conservative than that proposed by the Governor, especially with respect to the valuation exempted, and the exemption from municipal taxes.

The exemption was raised to include a maximum assessed valuation of $5,000—the maximum area of 160 acres on which the dwelling of the exemption claimant stands being retained in the 1938 statute. The exemption was also increased from the state millage to include the entire levy for ordinary governmental purposes only,[27] for counties, road districts, and school districts (including municipal separate school districts), except that county, road district, and school district millage rates are limited as provided by the statute of 1932.[28] A taxpayer in Hickory Flat Consolidated School district in Benton County, for example, would receive an exemption from a composite levy of 6 mills for the state, plus 8 mills for the county, plus 2 mills for county road funds, plus 4 mills for county school funds, plus 15 mills for Hickory Flat Consolidated School district, or a total of 35 mills on a maximum homestead value of $5000.

A very important provision in connection with the exemption of homesteads from local taxation is that with reference to the re-

[22]La. Const. (1934) art. 10, para. 4.
[23]Fla. Const. (1934) art. 10, para. 7.
[24]Miss. Laws (1934) c. 191.
[25]*Ibid.*
[26]Miss. Laws (Ex. Sess. 1935) c. 22.
[27]The exemption does not apply to taxes for debt retirement nor for the support of extraordinary activities such as fire protection, sewerage, paving, bridges, etc.
[28]Miss. Laws (1932) c. 104.

imbursement of the local governments for the revenue lost. The Governor insisted "that the State reimburse each taxing unit, county, district and municipal, for every dime of such loss." The general treasury was provided with funds for this reimbursement by a retention of the 2% retail sales tax, an increase in the state tax levy on non-exempt property by two mills, an increase in the beer and wine tax from five cents per gallon to 21.34 cents per gallon,[29] and an increase in the cigarette tax from one cent on each five cents to one fifth of one cent on each cigarette sold, or approximately one cent per package.[30]

In order that the legislature would have available estimates of the probable losses of revenue under various proposed exemption plans when it convened in July, the State Tax Commission conducted a survey to ascertain the probable revenue losses under assumed valuation limits of $2,500, $5,000, and $10,000, and full value, and each as applied to assumed 40-acre and 80-acre exemption plans.[31] The survey did not provide for a 160-acre homestead, and therefore is not conclusive as to revenue loss under the bill as passed. Nevertheless, the legislature did make an appropriation of "$5,250,000 or so much thereof as may be necessary" for the reimbursement[32] for the two fiscal years July 1, 1938 —June 30, 1940.

Deferring to a later place in this article a discussion of the merits and demerits of homestead exemption in principle, it is pertinent at this point to call attention to certain characteristics in the provisions of the Mississippi law, some of which are faced by every state enacting homestead exemption.[33]

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[29]Miss. Laws (Ex. Sess. 1938) c. 21.

[30]Miss. Laws (Ex. Sess. 1938) c. 22.

[31]MISSISSIPPI STATE TAX COMMISSION, SURVEY OF HOMESTEADS (June 20, 1938). For similar reports in other states, see KNIGHT, THE EFFECT OF THE PROPOSED HOMESTEAD EXEMPTION ON ASSESSED VALUE AND REVENUE RECEIPTS OF VARIOUS UNITS OF THE STATE OF ALABAMA (1936); THOMPSON AND MCELROY, *Homestead Tax Reduction in Iowa* (1937) IOWA STUDIES IN BUSINESS No. 17; RESEARCH DEPT., KANSAS LEGISLATIVE COUNCIL, HOMESTEAD TAX EXEMPTION (Preliminary and Supplementary Reports, 1936); Schmidt, *Homestead Tax Exemption* (1936) NEBRASKA STUDIES IN BUSINESS, No. 38; Thomas, *Exemption of Homesteads from Taxation: A Case Study in Oklahoma* (1935) 11 J. OF LAND & PUB. UTIL. ECON. 56; OKLAHOMA TAX COMMISSION, ANALYSIS OF THE EFFECT OF HOMESTEAD EXEMPTION IN THIRTY-ONE OKLAHOMA COUNTIES (1936); Logan, *The Oklahoma Tax Exemption Law* (1936) 14 TAX MAG. 79; INVESTIGATING COMMITTEE OF UTAH GOVERNMENTAL UNITS, REPORT ON THE HOMESTEAD EXEMPTION PROPOSAL (1936).

See also, May, *Estimating the Effects of Homestead Tax Exemption* (1937) 13 J. OF LAND & PUB. UTIL. ECON. 307; PAIGE, THE EXEMPTION OF HOMESTEADS FROM TAXATION (Am. Legislators' Ass'n. 1935).

[32]Miss. Laws (Ex. Sess. 1938) c. 16.

[33]There would not appear to be much difficulty as to the constitutionality of the Act. The discrimination against non-residents would not appear to be

There is, for example, an incentive, not contemplated in the homestead exemption of several of the states, to owners to make fictitious transfers for the purpose of receiving for themselves the benefits of exemption to which they are not entitled. Experience with homestead exemption is too little on which to base even a rough estimate as to the probable extent to which such fraudulent transfers may be made. The experience with evasions in the case of personal property, both tangible and intangible, and with misrepresentations in income tax reporting, however, is sufficient to indicate the reality of the problem in homestead exemption. The Alabama survey on "The Effect of the Proposed Homestead Exemption" considered it "very likely that legal titles to the greater per cent of these homes[34] will be transferred to individuals who could claim the exemption." A report by the Governmental Research Association in commenting on the situation in Florida, says:

> "However, it will be possible for owners of houses now rented to acquire homestead status for their property by using purchase contracts in place of lease. Florida courts have already held that a purchase contract interest is sufficient to sustain a homestead estate, (Hill v. First National Bank, 73 Fla. 1092). In view of this decision it is probable that practically all residential property will acquire homestead status."

In order to forestall the possibility of transfers made for the purpose of claiming homestead exemption to which the claimant is not entitled in this state, it should be noted that Mississippi rejects all contract sales of the type referred to above. The law rejects[35]

> "Any dwelling house, together with the land on which it is situated, which is not held in fee simple or under title as otherwise permitted, but which is being occupied under an agreement to buy, or under a conveyance or contract or conditional sale or purchase, or under any similar contract; and where the person occupying the dwelling is not personally liable to the state, or any political

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violative of the privileges and immunities clause of the Federal Constitution; because the discrimination is not between residents of states as such but as between occupants and non-occupants of homestead property. Logan v. Young, 191 Minn. 371, 254 N. W. 446 (1934); Note (1937) 23 Iowa L. Rev. 67. And it is well settled that the uniformity clauses of the Mississippi Constitution are not violated by exemptions. Jackson v. Miss. Fire Ins. Co., 132 Miss. 415, 95 So. 845 (1923); Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

[34]8,336 residents in Jefferson County acquired by insurance companies, building and loan ass'ns. and mortgage companies, through foreclosure.

[35]Miss. Laws (Ex. Sess. 1938) c. 18, § 4.

subdivision for the taxes due thereon, under the general revenue laws of the state."

"Any dwelling, together with the land on which it is situated, which is held in fee simple, or title as otherwise permitted, but upon which the owner has executed a mortgage, or deed of trust, the terms of which provide for interest only or which do not provide for reasonable payment of principal against the debt thus created or where the terms of the mortgage, or deed of trust, are unreasonable and improbable of execution, or where the mortgage or deed of trust exceed the fair value of the property, when such transactions are made after July 1, 1938."

In view of the above provisions it is improbable that Mississippi will be encountered by fictitious transfers to the extent feared in Florida or Alabama. There still remains the possibility, however, that a man owning two houses might fraudulently convey one of them to another individual, relying only on a secret agreement to hold for the transferor. Other similar devices are conceivable.[36]

Another feature of the Mississippi approach to homestead exemption that requires comment, has to do with the manner of refunding to the local units the tax loss as a result of exemption, and the effect that the exempting and refunding process has on the fiscal policies of the local governments. Here, it is doubtful if the safeguards are as adequate as in the case of bad faith transfers.

There is first the incentive to raise the millage rate on non-exempt properties. It is true that the statute does provide maximum millage rates for counties and road and school districts,[37] but there are counties and districts in Mississippi that either have not yet found it necessary to reach the statutory maximum or have been prevented from reaching it by voters who are now no longer taxpayers. The loss of the economizing force of these taxpayers must be recognized.

An excellent illustration of the tendency of exempted home owners to raise the assessment on other property is given in the Oklahoma Tax Commission's Bulletin on The Effect of Homestead Exemption in 1938: "[O]ur attention has been called to a bond issue recently voted in a school district in southern Oklahoma having an area of ten square miles, occupied almost altogether by tenants. There are three landowners living in the district whose homesteads are exempt; the remainder of the land is owned by

[36]For discussions of this aspect, see Martin, *op. cit. supra* note 3, at 48, 53; Notes (1937) 15 N. C. L. Rev. 211, 213-14; (1937) Yale L. J. 1023, 1040.
[37]Miss. Laws (Ex. Sess. 1938) c. 20, § 2.

persons living outside the district. The three landowners whose homes are tax exempt were reported to be the principal advocates of the bond issue. As none of the other landowners voted in the district the issue encountered little opposition." While it is true that under the Mississippi law this could not happen because homes are not exempt from taxation for debt service, nevertheless, the check is removed from holding the levies below the allowed maximum. In other words, a premium on public economy has been removed to a certain extent.[38] There is additional incentive for this type of manipulation because of the additional refunds to the local units from the state under the increased millage rate.

Another tendency that may result from homestead exemption and one that will receive added impetus from the above cited statutory limits to local millage rates, is the tendency to raise the valuation of homesteads for the purpose of increasing the refund from the state. The legislature attempted to forestall this tendency, and enacted that

> "It shall be unlawful for any board of supervivsors to increase, as a class, the assessed value of exempt homes in the county, or any part thereof, without at the same time making an appropriate increase in the assessment of other lands, or real estate, other than exempt homes."[39]

There are those who question whether there will be any tendency to such increased valuations. But whatever the result, it is doubtful if the above regulation will have much effect one way or the other. It has always been unlawful, for example, for assessors to discriminate in the assessment of property. Yet we know that unlawful discriminations in property assessments, as between individuals, between kinds of property, and between jurisdictions, permeate the entire property tax system. In fact, the policy of assessors to depress values in their own jurisdictions in order to shift as much as possible of the state levy to other jurisdictions has produced a sort of rivalry between local units that has made the property tax a farce.[40] Under the new law, since it becomes a matter, not of taxes flowing from the local jurisdictions to the general treasury of the state, but one of funds flowing from the general treasury out to the local units, there is every reason to expect a rivalry in the opposite direction and a gradual rise in the

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[38] *Cf.* Bloomenthal, *op. cit. supra* note 2, at 532.

[39] Miss. Laws (Ex. Sess. 1938) c. 18, § 28.

[40] This, of course, was the reason for the creation of the State Tax Commission. See RHODES, HISTORY OF TAXATION IN MISSISSIPPI, 1798-1929 (1931) 92 *et seq.* But in spite of this body in equalizing taxes, it is a well-known fact that most property in the state is assessed at far below its true value.

value of homesteads. It may be prudent, of course, to accompany these advances in homestead values by advances in non-exempt property values. This may be found particularly in jurisdictions where the majority of population are homestead owners who have much to gain, both in the way of refunds from the state and in taxes from non-resident owners, and little to lose by general valuation increases. Striking evidence of this possibility is found in the common knowledge of every student of taxation that the highest ratios of assessed to actual values tend to fall on the small property holder who is without adequate protection and the large non-resident holders who have no vote and not much local political power.

It is entirely probable that one of the valuable outgrowths of the homestead exemption movement will be a complete reform in the whole system of property assessments, and to bring this most important phase of our state and local taxing systems within the purview of state authority.

Attention was called above to the fact that the revenue losses to the state and local governmental units were replaced by an advance of two mills on non-exempt property and an increase in the beverage and cigarette taxes. A brief explanation should be made here, however, that aside from the gasoline tax, which is earmarked for highway construction and maintenance, Mississippi does not earmark its taxes for specific purposes. Consequently, the proceeds from all state taxes except the gasoline tax go into the general funds of the state and from there are dispensed for general purposes, one of which is now the making up of losses sustained by homestead exemption.

So while it is true that these new or additional taxes were laid concurrently with the enactment of homestead exemption, and for the purpose of preventing any revenue losses as a result of exemption, it is not entirely correct to say that the exemptions are financed by these particular taxes.

Nevertheless, assuming no increase in expenditures, and had there been no homestead exemption, either these additional taxes would not have been needed or they would have made possible a reduction of taxes somewhere else. In short, with the raising of the property tax rate, and the beverage and cigarette taxes the state had a choice between a reduction or elimination of taxes on homes or a reduction or elimination of some alternative tax. Since it elected to eliminate the taxes on homesteads, and since this creates a deficit in the general funds which is made up of funds from a number of other taxes, it is entirely proper to assume that any other tax going into the general funds is paying the cost of

homestead exemption. One may argue with equal force that homestead exemption is paid for by the taxes on corporations, the increased taxes on non-exempt property, the added excises on beverages and cigarettes, or a portion of the general retail sales tax.

For the purpose of making a cross-sectional analysis of the operation of homestead exemption in Mississippi, I have assumed that if the conditions of the treasury justified any tax reduction, the general retail sales tax would be the most logical one with which to begin. The objections to a retail sales tax are so widely understood that they do not require extended explanation here. It is sufficient to say that when all other factors are normal, the objections are so great as to make the sales tax one of the most universally condemned forms of taxation. In other words the penalty it exacts for the benefit it confers is of such character as to make its use one of the most questionable forms of taxation. Nevertheless, I am not one of those who can see no virtue in the sales tax. In spite of the injustices that it works on the lowest income groups of the state and the fact that it is generally regarded by tax students as one of the most odious of all taxes, it is still capable of bringing in large amounts of revenue in a fairly constant stream; and to the assessors' delight, "it plucks the goose with a minimum of squawking." But while fiscal adequacy is a most important consideration, there are off-setting social considerations that are also important—so important that they come close to equaling the strongest advantages that the sales tax has to offer. These considerations demand recognition as soon as urgent fiscal need has been met.

I therefore feel justified in selecting this tax to be placed in apposition to homestead exemption as a possible alternative claimant in considering tax relief, and in making an analysis on a relationship which assumes that a portion of the general funds collected as sales taxes is used for refunding deficits created by homestead exemption, thus financing the beneficiaries of homestead exemption by payment of sales taxes.[41]

In the accompanying tables I have attempted to show as effectively and as accurately as possible the operation of homestead exemption in the state of Mississippi as it affected both the counties and the citizens of the county per capita, of both homestead populaiton and tenant population. Attention should be called, however, to certain discrepancies in the years which the data represent which may bias the result somewhat, though not appreciably. With

[41] *Cf.* Hinckley and Haggerty, *Taxation in Aid of Farm Security* (1937) 4 LAW AND CONTEMPORARY PROBLEMS 546, 553.

respect to population figures for example, I have had to rely on the 1930 census which is now eight years old. The homestead valuations used were those of 1936, with the state-wide levy of 8 mills, the rate imposed in that year. The sales tax receipts considered were those for the year 1937. But I do not believe that either the population shift since 1930, or the fact that the homestead values and sales tax receipts represent different years, is sufficient to influence the results considerably.

From the figures in Column 2 of Table I, page 180, it may be seen that the gross savings to Adams County, for example, for the year 1936 were $13,282. This figure was arrived at by multiplying the Adams County homestead values, $1,660,310 shown on Table 10 of the State Tax Commission *Service Bulletin, Number 18*, July, 1937, by eight mills, the state levy for that year. Column 3 of Table 1 shows the proportion of the total sales tax receipts collected in 1937 used for homestead subsidy. For Adams County, the amount of $15,707, or the amount of the sales taxes collected in Adams County which was diverted into homestead exemption purposes for that year. This figure is arrived at by taking the proportion which the total homestead taxes saved for the entire state bears to the total retail sales taxes collected for the entire state, which provides a ratio of 13.3 per cent, and then multiplying that ratio by the total sales taxes collected in Adams County for the year in question. By taking the difference between the figures in Column 2 and those in Column 3 we can determine the net gain or loss to the county as a whole. For example, Adams County sustained a net loss of $2,425; Alcorn, on the other hand, experienced a net gain of $827.

In addition to showing the net gains and losses by counties I have also attempted to show as nearly as data will permit, the per capita net gains and losses for both homestead and tenant population. To do this it was first necessary to ascertain the number of homestead and tenant population in each county. The number of tenant population is shown in Column 9 and is taken from Table V, Mississippi State Planning Commission's report on *Farm Tenancy in Mississippi*, Release No. 7, March 1, 1937. By subtracting the figures in this column from the total population per county, as shown in the last census report, the number of homestead population, as shown in Column 5, is determined. In order to determine the per capita savings to homestead population by virtue of the exemption, it is only necessary to divide the amounts shown in Column 2 by the numbers of homestead population. For Adams County, therefore, $13,282 divided by 17,072 equals $0.78, the figure shown in Column 6, or the amount saved per capita of home-

stead population in that county as a result of the exemption. But this is not all a net gain, because those taxes lost to the state had to be replaced in some way; and in this article I am assuming that it was from the sales tax. Of the proportion of the sales tax that is diverted to homestead exemption, $15,707, in the case of Adams County, is divided by the total combined homestead and tenant population in that county in order to derive the per capita amount shown in Columns 7 and 10 which each individual in this county has contributed in the way of sales taxes to finance homestead exemption. In Adams County, this per capita amount is $0.69. In order to determine the net loss or gain to the per capita *homestead* population, it is necessary to take the difference between their savings, as shown in Column 6 and their corresponding losses, in sales taxes, as shown in Column 7. The result will be the figures shown in Column 8. For Adams County, the net gain per capita of homestead population is 9c. The per capita gains and losses for homestead population range all the way from a per capita net loss of $1.92 in Sunflower County to a per capita net gain of $2.57 in Tate County. In Column 10 is shown the per capita amounts which the tenants paid in sales taxes that were diverted to subsidizing homestead exemption. Their contributions to the funding of homestead exemption is, of course, assuming for a moment only, that their purchases are equal to, or the same as that shown for the homestead population. Unlike the homestead population, however, they do not receive any of their sales taxes back and their contribution is a 100% loss to them.[42]

In the discussion of the per capita net gains and losses above, a temporary assumption was made that the sales tax contributions were the same for the homestead population as for the tenant population. Of course that assumption is contrary to fact. As to what the relative per capita spendings of the two classes in Mississippi are, I do not have any reliable figures upon which to base an estimate. Suppose we assume that the homeowning class spends on an average, four times as much as the average tenant. It merely means that the contributions by the homestead population are proportionately larger, and that their per capita net gains are proportionately reduced. The net gain for the Adams County homestead owner would undoubtedly be transformed into a net loss, and corresponding reductions made in the net gains for the homestead population in other counties. With respect to the tenant population, the revised assumption that they spend less than the homestead group merely means that notwithstanding the fact that they pay less than the amount indicated in Column 10 because

[42] *Cf.* Thompson, *Homestead Tax Reduction* (1937) IOWA L. REV. 633, 652.

TABLE I.

THE OPERATION OF HOMESTEAD TAX EXEMPTION IN MISSISSIPPI FOR YEAR 1936

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7	Col. 8	Col. 9	Col. 10
	Total Taxes Saved to Homestead Population (Homestead value times 8 mills)	Loss in Sales Taxes to Entire Population to Offset Gain to Only Homestead Population	Net Gain or Loss to Homestead Population (Col. 2 minus Col. 3)	Homestead Population (1930 census minus Col. 9)	Per Capita Savings in Exemption to Homestead Population (Col. 4 divided by Col. 5)	Per Capita Loss in Sales Taxes to Offset Per Capita Gain to Homestead Population (Col. 3 divided by 1930 census)	Per Capita Net Gain or Loss Homestead Population (Col. 6 minus Col. 7)	Tenant Population	Per Capita Net Loss to Tenant Population (Same as Col. 7)
Adams	$13282	$15707	L$ 2425	17072	$0.78	$0.69	G$0.09	6492	$0.69
Alcorn	13242	12415	G 827	16563	.80	.46	G .34	7090	.46
Amite	10597	5364	G 5233	10167	1.04	.27	G .77	8545	.27
Attala	10003	8722	G 1281	14201	.70	.34	G .36	11834	.34
Benton	3978	1300	G 2678	3153	1.26	.12	G 1.14	6660	.12
Bolivar	16002	28153	L 12151	21024	.76	.19	G .57	50027	.19
Calhoun	6164	4985	G 1179	9888	.62	.41	G .21	8201	.41
Carroll	5661	3658	G 2003	7063	.80	.18	G .62	12702	.18
Chickasaw	7451	5585	G 1866	11333	.66	.27	G .39	9502	.27
Choctaw	4546	2419	G 2127	7826	.58	.20	G .38	4513	.38
Claiborne	4380	4820	L 440	5003	.88	.40	G .48	7149	.40
Clarke	6397	5284	G 1113	14240	.45	.27	G .18	5439	.27
Clay	8213	6368	G 1845	10096	81	.36	G .45	7835	.36
Coahoma	12155	25679	L 13524	14247	.85	.55	G .30	32080	.55
Copiah	12024	3713	G 8311	16050	.75	.12	G .63	15564	.12
Covington	6081	3138	G 2943	9854	.62	.21	G .41	5174	.21
DeSoto	9898	5306	G 4592	6539	1.51	.20	G 1.31	18899	.20
Forrest	20343	27962	L 7619	28284	.72	.93	L .21	1831	.93
Franklin	3920	3118	G 802	7654	.51	.25	G .26	4614	.25
George	3616	2296	G 1320	6146	.59	.31	G .28	1377	.31
Greene	3431	2157	G 1274	9718	.35	.20	G .15	926	.20
Grenada	8489	7846	G 643	9371	.91	.47	G .44	7431	.47
Hancock	3557	4071	L 514	11087	.32	.36	L .04	328	.36
Harrison	18524	34811	L 16287	43436	.43	.79	L .36	707	.79
Hinds	61012	90964	L 29952	82752	.74	1.07	L .33	2366	1.07
Holmes	13754	12511	G 1243	36159	.38	.32	G .06	2375	.32
Humphreys	5264	8520	L 3256	7191	.73	.34	G .39	17538	.34
Issaquena	746	1192	L 446	922	.81	.20	G .61	4812	.20
Itawamba	5770	2579	G 3191	8601	.67	.14	G .53	9624	.14
Jackson	9337	8161	G 1176	15355	.61	.51	G .10	618	.51
Jasper	7773	3549	G 4224	11368	.68	.19	G .49	7266	.19
Jefferson	4337	3320	G 1017	5286	.82	.23	G .59	9005	.23

Jefferson Davis	7886	3094	G	4792	6796	1.16	.22	G	.94	7485	.22
Jones	23727	25387	L	1660	34142	.69	1.75	L	1.06	7350	1.75
Kemper	6421	3800	G	2621	20856	.31	.17	G	.14	1025	.17
Lafayette	7065	5907	G	3158	9664	.73	.30	G	.43	10314	.30
Lamar	3067	2397	G	670	10781	.28	.19	G	.09	2067	.19
Lauderdale	39830	37649	G	2181	44648	.89	.71	G	.18	8100	.71
Lawrence	5391	3495	G	1896	7142	.75	.28	G	.47	5329	.28
Leake	8161	4793	G	3368	13383	.61	.22	G	.39	8420	.22
Lee	17750	18663	L	913	19454	.91	.53	G	.38	15859	.53
Leflore	12132	28578	L	16446	21279	.57	.53	G	.04	32227	.53
Lincoln	15686	10818	G	4868	17921	.88	.41	G	.47	8436	.41
Lowndes	15750	15813	L	63	17875	.88	.53	G	.35	12112	.53
Madison	14173	10486	G	3687	13488	1.05	.29	G	.76	22308	.29
Marion	10708	9146	G	1562	13979	.77	.46	G	.31	5944	.46
Marshall	4985	5737	L	752	8198	.61	.23	G	.38	16671	.23
Monroe	15578	11588	G	3990	20682	.75	.32	G	.43	15459	.32
Montgomery	7900	5079	G	2821	8530	.92	.34	G	.59	6479	.34
Neshoba	10264	7764	G	2500	16743	.61	.29	G	.32	9948	.29
Newton	9429	6704	G	2725	14655	.64	.29	G	.35	8255	.29
Noxubee	7130	6982	G	148	9533	.75	.27	G	.48	16027	.27
Oktibbeha	9327	7787	G	1540	9588	.97	.41	G	.56	9531	.41
Panola	9713	9623	G	90	7763	1.25	.34	G	.91	20885	.34
Pearl River	4116	9791	L	5675	17839	.23	.50	L	.27	1566	.50
Perry	2769	1964	G	805	6543	.43	.24	G	.19	1654	.24
Pike	16675	16248	G	427	24771	.67	.70	L	.03	7430	.70
Pontotoc	11345	5675	G	5670	11084	1.02	.25	G	.77	10950	.25
Prentiss	8533	4855	G	3678	9915	.86	.25	G	.61	9350	.25
Quitman	3505	6255	L	2750	4507	.77	.25	G	.52	20797	.25
Rankin	6563	5916	G	647	11167	.58	.29	G	.29	9186	.29
Scott	7224	6852	G	372	13118	.55	.33	G	.22	7796	.33
Sharkey	2902	6236	L	3334	3428	.85	.45	G	.40	10449	.45
Simpson	7244	4060	G	3184	13993	.51	.19	G	.32	6904	.19
Smith	5953	2527	G	3426	11400	.52	.13	G	.39	7005	.13
Stone	2834	2196	G	638	5072	.56	.39	G	.17	632	.39
Sunflower	14131	17133	L	3002	17532	.80	2.72	L	1.92	48832	2.72
Tallahatchie	5780	7984	L	2204	12438	.46	.22	G	.24	23130	.22
Tate	7123	4633	G	2490	2515	2.83	.26	G	2.57	15156	.26
Tippah	8839	4053	G	4786	9809	.90	.22	G	.68	8849	.22
Tishomingo	5240	3573	G	1667	11005	.47	.22	G	.25	5406	.22
Tunica	2839	7207	L	4368	1926	1.47	.34	G	1.13	19309	.34
Union	12711	6271	G	6440	10907	1.17	.29	G	.88	10361	.29
Walthall	7926	4250	G	3676	6011	1.31	.31	G	1.00	7861	.31
Warren	24992	26432	L	1440	27533	.90	.74	G	.16	8252	.74
Washington	15666	41693	L	26027	24676	.64	.77	L	.13	29634	.77
Wayne	5966	3431	G	2535	11077	.53	.22	G	.31	4218	.22
Webster	5734	3738	G	1996	6533	.87	.31	G	.56	5595	.31
Wilkinson	4780	4192	G	588	7293	.65	.30	G	.35	6664	.30
Winston	11901	6218	G	5683	14175	.83	.29	G	.54	7064	.29
Yalobusha	6677	4877	G	1800	10050	.66	.28	G	.38	7700	.28
Yazoo	14538	14566	L	28	15046	.96	.39	G	.57	22216	.39

of their still lower incomes they were even less able to bear the increased burden than they would have been under the first assumption. It is well known that the smaller the income a person has, the more precious every dime becomes to him.

A very significant disclosure of this analysis is in respect to the transfer of funds between counties. I have taken the figures for net gains and losses for the counties as found in Column 4 of Table I, and arrayed them into columns, Table II, showing those counties which have been net beneficiaries as opposed to those counties which show net losses. This relationship is also shown graphically on Chart I, page 183, the white triangle above the "0" line depicting the size of "subsidy" to one group of counties, at the expense of the losing counties, whose losses are represented by the black triangle below the "0" line. The gains range from

TABLE II.
LOSSES AND GAINS BY COUNTIES DUE TO DIVERSIONS OF SALES TAXES TO HOMESTEAD SUBSIDY

GAINS BY COUNTIES

Panola	$ 90	Choctaw	2127
Noxubee	148	Lauderdale	2181
Scott	375	Tate	2490
Pike	427	Neshoba	2500
Wilkinson	558	Wayne	2535
Stone	638	Kemper	2621
Grenada	643	Benton	2678
Rankin	647	Newton	2725
Lamar	670	Montgomery	2821
Franklin	802	Covington	2943
Perry	805	Simpson	3184
Alcorn	827	Itawamba	3191
Jefferson	1017	Leake	3368
Clarke	1113	Smith	3426
Lafayette	1158	Walthall	3676
Jackson	1176	Prentiss	3678
Calhoun	1179	Madison	3687
Holmes	1243	Monroe	3990
Greene	1274	Jasper	4224
Attala	1281	DeSoto	4592
George	1320	Tippah	4786
Oktibbeha	1540	Jefferson Davis	4792
Marion	1562	Lincoln	4864
Tishomingo	1667	Amite	5233
Yalobusha	1800	Pontotoc	5670
Clay	1845	Winston	5683
Chickasaw	1886	Union	6440
Lawrence	1896	Copiah	8311
Carroll	2003		

LOSSES BY COUNTIES

Yazoo	$ 28	Sunflower	3002
Lowndes	63	Humphreys	3256
Claiborne	440	Sharkey	3334
Issaquena	446	Tunica	4368
Hancock	514	Pearl River	5675
Marshall	752	Forrest	7619
Lee	913	Bolivar	12155
Warren	1440	Coahoma	13524
Jones	1660	Harrison	16287
Tallahatchie	2204	Leflore	16446
Adams	2425	Washington	26027
Quitman	2750	Hinds	29952

CHART I.

TRANSFER OF FUNDS BETWEEN COUNTIES LOSING TO THOSE GAINING THROUGH THE SALES TAX–HOMESTEAD EXCHANGE

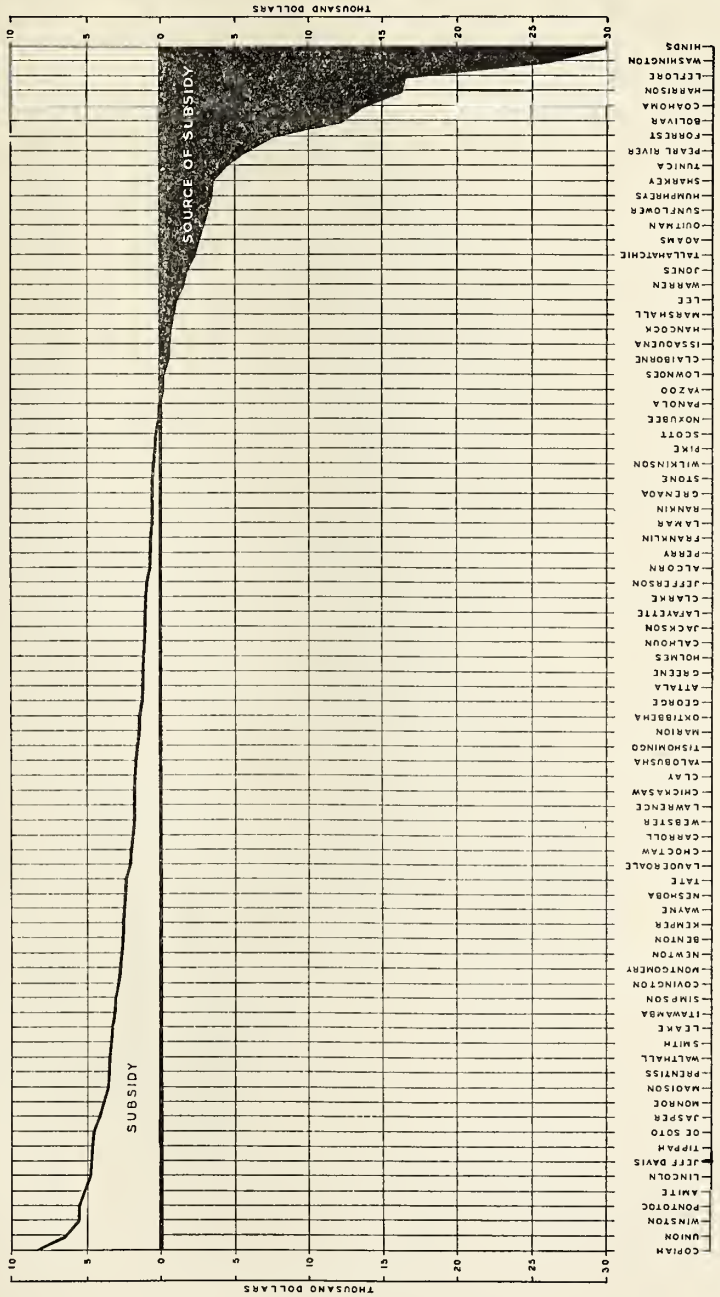
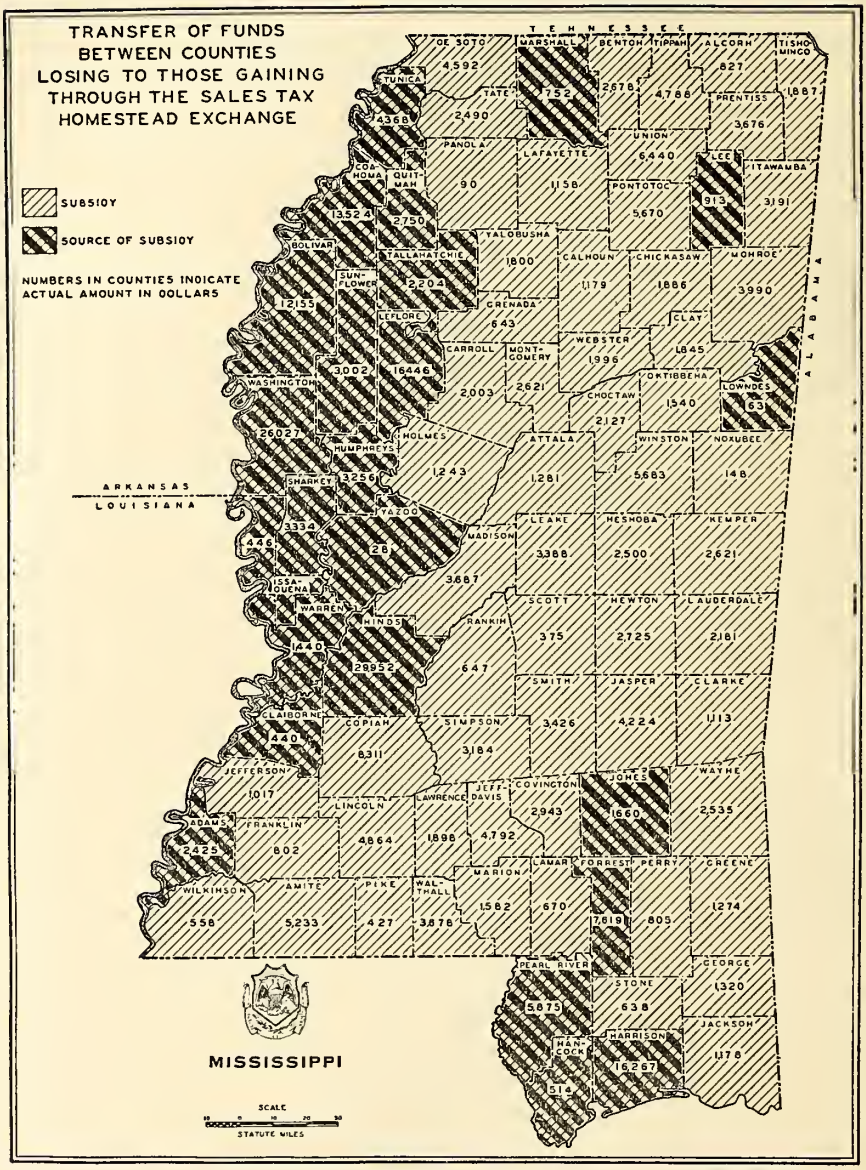


CHART II.



$90 in Panola County to $8,311 in Copiah County. Twenty-four of Mississippi's 82 counties show net losses, the losses ranging from $28 in Yazoo County to $29,952 in Hinds. The geographic relationship of the areas of the state losing to those gaining is graphically shown in Chart II, page 184.

The explanation for the losses in revenue to the losing counties are not always the same. The amount of tenancy is certainly an important factor. For example, in Bolivar County, one of the heavy losers, the tenancy population is over 70% of the total.[43] In Coahoma, another heavy losing county, the tenancy ratio is over 69%. In other instances, the loss is more apparent than real, due to the fact the losing county contains an important center which draws trade from other territories. Hinds, for example, while it has one of the lowest tenancy ratios in the state, (less than 3%) contains the city of Jackson, the largest city in the state. Undoubtedly a large part of the sales tax credited to Hinds County is paid by traders coming from outside the county. Harrison County, the fourth largest loser in sales taxes contains the smallest tenancy ratio, only 1.6%. But here again is an important trading center, the city of Gulfport. Undoubtedly a large part of its losses are in taxes paid by visitors from other counties and even in large part from other states. In some instances there are probably several factors to account for revenue losses. In Washington and LeFlore Counties, for instance, the second and third largest losers, while they have tenancy ratios of 54.6% and 60.2% respectively; they also have the cities of Greenville and Greenwood respectively. Consequently, while in part the losses to these counties are undoubtedly real, in other respects they are only apparent.

In connection with the foregoing analysis, attention is again called to the fact that these movements of funds are based, not on the exemptions as allowed under the 1938 statute, but under the statute of 1935, when the rate of exemption applied to only the state levy of 8 mills. Under the present exemption which applies to both state and local millage, these migrations should be much greater and effects more pronounced.

Any complete analysis of homestead exemption requires some statement of its effect on property values. Generally, it might be expected that to relieve any kind of property of all or part of its tax burden would result in an increase in its value. In order to demonstrate how this works in the case of homestead exemption we might assume a reduction or exemption of a 10 mill tax, on a $2500 value. Ten mills per $2500 yields a tax or places a burden on the taxpayer in the amount of $25 a year. If it is assumed that a sum saved is equivalent to a sum received, then the $25 saved as a result of the exemption would be equivalent to a $25 annuity. If it is further assumed that the exemption is a permanent part of the state's fiscal program, then this annual saving could be capi-

[43]Tenancy ratios taken from Table V, MISS. STATE PLANNING COMM. REP., FARM TENANCY IN MISSISSIPPI (Release No. 7, 1937).

talized at the current rate of interest for that character of investment, risk, etc., which would probably be about 5%. Twenty-five dollars per annum capitalized at 5% is $500. Thus, other things remaining unchanged, the value of the exempted property in question would be increased from $2500 to $3000. There would be no rise in values on non-exempt properties, however, because the owners of those properties would have not received any special consideration. Furthermore, the homestead owner who benefitted by the decrease in the expense of maintaining his homestead could probably not realize on the increased value of his homestead in a sale. In the first place there was a supply of land and homes available for his prospective puchaser which did not come within the exemption and therefore did not experience the rise in values resulting from the removal of taxes. In a sale, he would have to take a price in line with that of non-exempt properties, which would mean that there would not be the increased market value on homesteads that would appear on first thought. The result is that this increased value would exist only so long as the property was in the hands of the present owner. There would probably be no long run noticeable change in property values at all. It would present the very interesting and unusual situation of increased income without the corresponding increase in property values.

In the second place, disregarding the matter of property values, this increased income to the homestead owner is not an unmitigated gain, as has previously been shown. In any event, the state must have its revenue, and in most cases every property owner who has received homestead exemption will pay in part or in whole in some other way for his exemption. Under our assumption of the sales tax as the fund from which the exemption is paid, the sales tax diverted to homestead exemption will always reduce, and in many cases may completely obliterate, the gain from exemption. The larger the proportion of sales tax the home owner pays, the more likely this is to be true.

This raises the very pertinent question as to whether homestead exemption really does relieve tax burden. It may, for a time, relieve the burden for some by switching it to others. This may be done by collecting the replacement funds in the form of heavier taxes on non-exempt property owners, or of sales taxes which fall largely on non-property owners. On the other hand, it may be merely a switching of funds from one pocket, a few cents at the time, and then a refunding in a lump sum into the other pocket of the same individual at the end of the year.

The failure to see a multitude of small sums going out to create the large sum to be returned later in a lump which can be

seen, makes those who turn the trick appear as benefactors. Unfortunately this condition creates a circumstance whereby an apparent means for achieving a most commendable end, that of increasing home ownership, may easily be converted into an electioneering device. Governor White is to be commended for his appreciation of this circumstance and for his frank and realistic cautioning of the legislature:

> "By the close of this period, June 30, 1940, this program, if enacted into law at this special session, will have been on the statute books for two years. Time will have been afforded for at least a fair test of its practical effects, its weaknesses and defects, its good points and its bad. It may be strengthened, modified or repealed by the Legislature which will convene in 1940. In the ordinary course of events, many of you who are now here will be here then. *You can bear witness to the good faith and sincerity of purpose with which this matter has been dealt by all of us.*[44] (Italics mine).

In the specious simplicity of homestead exemption, which accounts largely for its appeal to the public imagination, there lurks a serious danger. There is one great hazard in obvious, easy-sounding, or so-called "practical remedies" to social problems. That is, that they *are* "obvious" or "practical". They serve as detours from the slower and more laborious processes. To the practical-minded, for example, it is perfectly obvious that the earth is flat, and that it is revolved around by the sun. At one time, for anyone to suggest otherwise meant serious castigation. Of course, denial now of what is still obvious to the eye, with respect to the shape and motions of the earth, is no longer a crime, because we have come to accept without question the conclusions of scientific investigation that the "obvious", is not necessarily true.

To many of the "practical-minded" today it is perfectly obvious that to exempt homesteads from taxation would, by that act alone, not only furnish an effective incentive to more people to buy homes, but would also provide them with the necessary additional cash. The problem has undoubtedly been over simplified.[45] Some of the practical-minded of our forefathers attempted to chart a course to a nation of happy, contented, prosperous people by the subsidizing of large factories through protective tariffs. True, we have had much prosperity, but it was in spite of, and not because of tariff protection. It has made many men wealthy, but paupers of

[44]Governor's Message, July 6, 1938.
[45]*Cf.* Bloomenthal, *op. cit. supra* note 2, at 398.

many more, and the standard of our whole national life is lower than it would have been without the protection.

As for the one reasonably sure way to find out how effective exemption is in the creation of home ownership, it is necessary to have a direct inquiry made of the purchaser every time a house is purchased as to what extent he was influenced by not having to pay taxes on his new home. If that were done for every homestead purchased in the State of Mississippi until the next session of the legislature and the results tabulated, the legislature would then have something tangible and definite to go by in shaping future policy.

Another important thing in working out a policy for the reduction of tenancy and increase in home ownership, is information as to causes *other than taxation* which tend to decrease home ownership. A very valuable fund of information could be secured by checking the records back for the past ten years, where possible, to ascertain why people have lost their homes. In Mississippi, during the critical part of the depression in the early part of the present decade, thousands of farms passed into state ownership through foreclosure for taxes. What proportion of these foreclosures was actually due to tax burden, and what proportion was due to the poverty of the soil itself—so poor that it would not produce the costs of its cultivation? How much of it had been so eroded of its good soil or otherwise allowed to deteriorate that it was not worth the taxes? How many homes in the state of Mississippi have been lost due to any single, or a combination of factors other than taxation? The President's Conference on Home Building and Home Ownership[46] in 1932 made a comprehensive study of causes of foreclosure, urban and rural, through out the United States. I quote from the report, page 17, as follows:

> "In each case of foreclosure the borrower fails to meet obligations that are legally binding upon him regardless of decline of property values or similar external factors. Failure to do so is attributed, in answers to questionnaires filled out by several hundred first mortgage lenders, to the following causes in order:
>
> 1. Borrower was unable to pay because of unemployment.
> 2. Financial circumstances of borrower did not warrant purchase of a home.
> 3. Borrower was unable to pay because of special assessments and increases in taxation.

[46]Note 18, *supra.*

4. Borrower had contracted for too many other installment purchases.
5. Borrower had sustained business or stock market losses.
6. Borrower was a speculative builder or a holder who failed to find a purchaser.
7. Domestic troubles of borrower.
8. Borrower was dishonest.

"A question as to number, in order of importance, of external difficulties contributing to default, gave the following results:

1. General decline in home property values.
2. Loan was too large a percentage of value.
3. Intrusion in neighborhood of incompatible elements, or other change in the character of the neighborhood.
4. Home out of keeping with neighborhood.
5. Poor construction of building.
6. Loan was made on property in a subdivision not yet developed.
7. Zoning law was inadequate.

"More than 85 per cent of the lenders found that the personal causes of default had more to do with the present situation than the external contributing difficulties."

To what extent do the difficulties of home ownership throughout the nation in 1932 apply to the State of Mississippi today? If Mississippi is in earnest about this matter of increasing home ownership, the only way to attack the problem in an intelligent manner is for the state to send agents out into the field to find out what the factors are that stand between those who desire homes and home ownership and to apply remedial measures at the points of actual weakness.[47]

Attention is called to the fact that of the 15 important causes cited above, taxation is only *part of one*—"special assessments and increases in taxation." Certainly relief from taxation alone will not correct all of the other difficulties. This problem of taxation and home ownership is an important one. It calls for thorough study and correction—but only along with all of the other factors that go with it, if a solution is to be found. To cite only one illustration, it would be no answer to home ownership for the state to relinquish its interest merely to establish a mortgage holder as prior claimant in case of foreclosure.

[47]See also, Bloomenthal, *op. cit. supra* note 2, at 527.

Incidentally, it might develop that the extent of illiteracy, or of inadequate health service, for example, as remote as these elements may appear to the realist, are important factors in maintaining poverty and tenancy in the state. According to the bureau of census, there are only three states in the nation, a greater percentage of whose population cannot read and write than in Mississippi. Most of these may, in fact, be negro, but many of them are white. But just as a case of small pox may endanger the health and lives of every person within a community, white and black, so may bad health, disease and ignorance among a large part of the population pull down the general standard of health, intelligence, and living for the whole. The question may very properly be raised as to whether the long-run increase in home ownership and public welfare would not be greater if the $816,524.52 in 1936 and the increased amounts under the present program, which were collected in sales taxes from the people as a whole to finance homestead exemption for a portion, had been diverted to common school education.

Now for the problem of the property tax. Students who have given thought to the matter are convinced that the whole movement for homestead tax exemption strikes at the heart of the problem of property taxation. It is a logical corollary of the current agitation for property tax reform and "mass welfare" legislation. But property tax reform is an objective which calls for state-craft of a high order, and those who shape programs of desirable reform should beware of the damaging results that may flow from a further extention of the exemption doctrine in the property tax field.

If the property tax, as it is now functioning, is a barrier to home ownership, would it not be a wiser policy to direct correctives toward fundamental reforms in the property tax as a whole than to clutter the system with an extension of exemptions and to an increasing reliance on taxes that run counter to every reasonable criteria of justice and ability to pay?

It is probable that the greatest burden of the property tax is not the actual amount of the tax, but the inequalities with which it bears. Certainly for every dollar that one person can evade there must be an equivalent sum added to another's bill. The amount of property exemptions before the enactment of the exemption bill was one factor that undoubtedly increased the burden on home owners. It may be that a wise thing to have done would have been to decrease the exemptions then operative, rather than to contract the base still further.

Another important manner in which homes are excessively tax-burdened is in the inequalities of assessment. Every man experienced in taxation knows that homes, and the small-priced homes in particular, bear the heaviest proportional share of the property tax burden.

As evidence of this situation, in a study by the North Carolina Tax Commission,[48] for example, of the taxation of city real estate based on a sample of 1,062 properties, there was shown an even regression from a level of 66.5% for property valued at less than $4,000 to a level of 56.7% for properties valued at more than $50,000. Professor F. P. Weaver examined 178 poperties in the city of Lancaster, Pennsylvania, for the year 1921, comparing the assessments with appraised value. He found that lower priced properties were assessed almost twice the rate of the average for the entire group. Certain unusual properties raised the average level of the higher priced groups, but by eliminating 9 such cases out of 178, the average level was 18.7%, or a little over one-third of the rate of assessment of the cheaper city properties.[49]

Professor H. D. Simpson of Northwestern University examined 1,672 urban and village properties in ten counties in Illinois in 1927 and found the ratio of assessed to sales values ranging all the way from 44.6% for the lowest priced group down to 25% for the highest priced group. He presents this very informative data which is reproduced in Table III.[50]

In March of this year the Commission of the City of Birmingham, Alabama appointed a committee to investigate the school sit-

TABLE III.
ILLINOIS URBAN AND VILLAGE PROPERTIES
CLASSIFIED ACCORDING TO VALUE
1927*

Value of Property	Number of Properties	Percentage of assessed to sales value
Under $1,000	548	44.6
$ 1,000- 2,500	519	36.4
2,500- 5,000	361	30.0
5,000-10,000	178	26.8
10,000-20,000	43	27.4
20,000 and over	23	25.0
Total	1,672	29.7

*Simpson, H. D., The Tax Situation in Illinois (1929) The Inst. for Research in Land Econ. and Pub. Util. 36.

[48]Report of North Carolina Tax Commission (1928) p. 216.

[49]Weaver and King, *Some Phases of Taxation in Pennsylvania* (1926) BULL. OF PA. DEPT. OF AGRICULTURE 14.

[50]Simpson, *The Tax Situation in Illinois* (1929) INST. FOR RESEARCH IN LAND ECON. AND PUB. UTIL. 36.

TABLE IV.

PERCENTAGE OF ASSESSED VALUE TO ACTUAL VALUE, 18 BLOCKS, CONSISTING OF 105 PARCELS OF PROPERTY IN BIRMINGHAM, ALABAMA*

Block	Percentage of Value Assessed Per Parcel	Average Percentage	Block	Percentage of Value Assessed Per Parcel	Average Percentage	Block	Percentage of Value Assessed Per Parcel	Average Percentage
A	120%			47%			51%	
	68%			48%			50%	59%
	83%			60%	58%	M	66%	
	51%		H	33%			72%	
	93%			36%			92%	
	60%			37%			88%	
	80%			37%			73%	78%
	75%	80%		37%		N	63%	
B	85%			36%			72%	
	85%			36%			60%	
	85%	85%		37%			53%	
C	58%			38%	37%		67%	
	90%		I	35%			11%	55%
	90%			42%		O	48%	
	64%			42%			40%	
	66%			36%			40%	
	70%			30%			40%	
	60%	70%		35%	36%		37%	
D	52%		J	56%			69%	44%
	54%			56%		P	57%	
	50%			47%			50%	
	35%			47%			54%	
	66%	51%		42%			60%	
E	46%			60%	51%		50%	
	60%		K	27%			64%	55%
	114%			49%		Q	29%	
	36%			34%			33%	
	84%	66%		34%			40%	
F	116%			29%			38%	35%
	106%			34%		R	38%	
	70%			36%			55%	
	50%			21%	34%		54%	
	35%	60%	L	68%			42%	
G	60%			60%			40%	
	72%			66%			46%	45%

Summary

Number of parcels examined	105
Number of blocks examined	18
Percentage of assessed value on properties examined	38%
Range of percentage of assessed value by blocks examined from	34% to 85%

*The Birmingham School Situation (Published by City of Birmingham, Alabama, 1938) at 50.

uation in that city, with the view to a general improvement of the school system financially and otherwise. The investigations of the committee necessarily took it into problems of property taxation. The display of amazing inequalities in assessments ranging upward from one property assessed at only 11% of its actual value, in a study of 105 separate properties, to one property assessed at 120% of its actual value, is represented in Table IV, page 192. Particular attention is called here to the wide range in ratios of assessed to actual values even within a single block.

As further evidence of the gross inequalities in property assessments in Birmingham, I am taking the liberty to present another page from the bulletin mentioned, which is reproduced in Table V. The inequalities shown in this table require

TABLE V.

A SHOWING OF INEQUALITIES IN ASSESSED VALUES TO SALES VALUES OF PROPERTIES IN BIRMINGHAM, ALA.*

A list of 67 sales by a Birmingham institution made in 1937 and 1938 shows the following:

15% to 19%	1 property	60% to 64%	8 properties
20% to 24%	1 "	65% to 69%	5 "
25% to 29%	3 properties	70% to 74%	2 "
30% to 39%	3 "	80% to 89%	1 "
40% to 44%	5 "	90% to 94%	1 "
45% to 49%	19 "	100%	1 "
50% to 54%	7 "	115%	1 "
55% to 59%	8 "	116%	1 "

Percentage assessments to list price, all properties 53%

Another list of sales by a Birmingham institution made in 1937 and 1938 shows the following:

6% to 10%	2 properties	51% to 60%	16 properties
16% to 20%	2 "	61% to 70%	8 "
21% to 30%	10 "	71% to 80%	5 "
31% to 40%	11 "	81% to 100%	2 "
41% to 50%	16 "	100% to 107%	3 "

Percentage assessment to list price, all properties 46.5%

A Birmingham real estate firm offers for sale 247 pieces of property and the following are percentages of assessed valuation to list price:

20% to 24.99%	6 properties	45% to 49.99%	34 properties
25% to 29.99%	14 "	50% to 54.99%	28 "
30% to 34.99%	32 "	55% to 59.99%	5 "
35% to 39.99%	53 "	60% to 64.99%	2 "
40% to 44.99%	70 "	65% to 69.99%	1 "

70% and over 2 properties

Percentage assessment to list price, all properties 42%

*The Birmingham School Situation (Published by City of Birmingham, Alabama, 1928) at 44.

no comment. The circumstances which they reveal stand out clearly enough. On the strength of the findings, part of which is presented here, the committee in question and the County Commission of Jefferson County requested a complete reassessment of all the property in the county. Atlanta and Fulton County of Georgia also recommended revaluations. Practically the entire state of Connecticut has been reassessed.

For those who may be particularly interested as to how farm and residence property assessments stand in relationship to those of other properties, a study by the North Carolina Tax Commission is most revealing. Its results are reproduced in Table VI. It will be noted from this table that urban residence property

TABLE VI.

RATIO OF ASSESSED VALUE OF PROPERTY TO ESTIMATED MARKET VALUE—1927

Classes of business or property	Average ratio
Public service corporations	
Steam railroads	68.8%
Electric light and power companies	68.8
Telephone companies	74.2
The Pullman company	61.0
Urban real estate	
Business property	57.6
Residence property	63.1
Farm property	75.3

is assessed at an average ratio not only higher than that of urban business property, but 2.1% higher than that of even the Pullman Company—farm property is assessed at a higher average ratio than either urban business or residence property, or even that of any of the public utilities in the state. Is it any wonder that the home owner cries out for relief?

In this connection some consideration should be given to the matter of rental property taxation. The belief is too current that the tenant does not pay any property tax. One of the arguments advanced for homestead exemption is that it places the home owner on the same level with the farm tenant in the country or with the apartment dweller in the city "who pay no taxes". The error in this notion is very simple. It grows out of a failure to understand the incidence of taxation.

In order to clear up this misconception, however, it is first necessary to recognize the distinction between land *per se*, and the improvements on land, because under ordinary conditions the tax

on land *per se* is not shiftable to the tenant, while that on the improvements is shiftable.[51]

With respect to the incidence of the tax on land, it is necessary to assume that the tenant who is cultivating a piece of land is doing so because he feels that he can receive equally as large a return from that kind of employment as from anything else he might do. Or, if the land is for residence purposes only, he feels that he is getting the use of the land that he is renting as cheaply as any other to which he could go under equally desirable circumstances.

Now suppose the land owner attempted to raise the rent on his land high enough to include any increases in his tax levy. The inevitable result would be a reduction in the earnings of his tenant. The tenant would then have either one of two alternatives to remaining on the farm at his reduced wage: (1) he could quit farming altogether and go into some kind of employment where he would receive as high a wage as on the farm, or (2) if no such other employment were available, he could go to land that bears no rent. That there are thousands of acres of such no-rent land in Mississippi is eloquently testified to by the enormous quantities that came into the possession of the state and are still in its possession because it is not even worth the taxes. It would be in the tenant's interest to leave his landlord and go to such land. The landlord, therefore has no alternative but to pay the taxes. The present owner cannot even sell his property without losing the capitalized value of the tax. Since any prospective purchaser would realize that the carrying charges of the land have been increased by the tax, he would offer to buy it only at a price low enough to absorb the added tax.

With respect to residence property, the situation is the same. There is plenty of land lying around every community waiting to be developed if only the cost of those already developed go high enough to induce tenants there to move to less expensive sites. Consequently, if the land owner of a residence site raises the rent high enough to include his land tax, the tendency of the tenant will be to look elsewhere. The owner of an undeveloped plot of ground will be glad to have the new tenant, and will be willing to offer him the property for its rental value only. To avoid losing his tenant, therefore, the owner has no choice but to absorb the tax.

With respect to the tax on the improvements on land, however, such as houses, barns, *etc.*, the story is different. Unlike land, where there is no cost of production, there is a cost of pro-

[51] *Cf.* Thompson, *op. cit. supra* note 42, at 633, 655.

duction for all of the improvements. The tax operates as part of that cost, and must be included in the sale or rental price if production is to take place. No one would build a house to rent if he did not think his prospective tenants would pay at least the entire cost, including taxes. Consequently, if tenants are to have improvements provided for them, they have no choice but to pay the taxes on those improvements.

Of course, after improvements have been constructed, if the landlord has misjudged the situation and there is not the tenant demand which he expected, just as in the case of an over-supply of anything else where the entire cost cannot be realized, the owner must be the loser, and he will tend to let his property deteriorate. But once the improvements have run down, or deterioriated, he will not restore them until he is reasonably sure of recovering all of his costs, including taxes. But he can do nothing about the taxes on his land. These are the reasons why economists contend that land and improvements should always be assessed and taxed separately.[52]

Where a community is progressive, and there is need for new buildings, it is usually safe to assume that under normal conditions tenants are absorbing the taxes on the buildings. On the other hand, if the community is decadent, and there are many vacant buildings about, it can usually be assumed that the landlord is bearing the tax. In Mississippi, there is every evidence of progress at the present time. Highways are being constructed all over the state, rural power and telephone lines are being extended, and in nearly every town there is considerable building construction. Consequently, it is a fairly safe assumption that the tenants are paying the taxes on these improvements. To argue that they are not is to argue that the economy of the state is in a decadent condition.

As for the proportion of the total tax that is passed on to the tenant, in the cases where the tenant does pay the tax, it depends upon the proportion of the improvement values to the land values. In the case of urban property, where the building value is usually so much greater than the site value, the largest part of the tax bill will undoubtedly be paid by the tenant. As for farm property, where the land value is usually greater in proportion than building value, the tenant would of course bear a proportionately smaller share of the tax. It is, however, a definite mistake to assume that the tenant does not pay a property tax. In fact, if justice and

[52]*Cf.* Carlton, *Economic Implications of Homestead Tax Exemption* (1937) 13 J. OF LAND & PUB. UTIL. ECON. 343; Schmidt, *Problems of Homestead Tax Exemption* (1938) 16 TAX MAG. 211; Thompson, *op. cit. supra* note 42.

equality are to be maintained as between homestead owners and tenants, the very nature of the circumstances require that if one is to be granted exemption the other should be given the same consideration. This particularly applies to urban properties where the dominant values take the form of improvements.

In this connection, attention is called to an illuminating study of the inequalities in assessments of urban rental properties made by the North Carolina Tax Commission and presented in its report for 1928. This data which shows the ratio of taxes to rent for 859 properties, classified by use, region and value, is reproduced in Table VII.[53] Attention is called to the fact that the average percentage of net rent, (before taxes), taken in taxes, is

TABLE VII.

PERCENTAGE OF NET RENT TAKEN IN TAXES AND PERCENTAGES EARNED ON FAIR MARKET VALUE OF CITY PROPERTY IN 1927

Classification of Property	Number of cases	Percentage of net rent (before taxes) taken in taxes	Percentage earned on fair value after expenses and taxes	
			Before depreciation	After depreciation
Business	275	28.0	5.0	3.9
Residential	584	34.5	5.5	3.2
Total	859	29.5	5.1	3.8
Tidewater	106	38.5	5.2	3.3
Coastal plain	329	31.5	5.6	3.8
Piedmont	330	26.9	5.0	3.9
Mountain	94	32.2	4.5	3.3
Value classes:				
$0-$4,000	416	47.7	5.2	2.2
4,001-10,000	164	39.4	5.4	2.9
10,001-50,000	187	30.3	5.4	3.9
Over 50,000	92	27.4	5.0	3.9

almost 6% higher for residential property than for business property, and that the average percentage of value for the class with values below $4,000 is 20.3% greater than that for properties of over $50,000 value.

For purposes of comparing the assessments of the income of rental urban properties with that of rental farm and other kinds of rental properties, we also take the liberty to reproduce the findings of the North Carolina Tax Commission in that respect.[54] The data is shown in Table VIII. Attention here is called to the fact that except for rented city property, the assessment ratio on *rented farms* is heavier than that on any of the other kinds of property investigated—and that for rented city property, the kind

[53]Simpson, *op. cit. supra* note 50, at 219.

where the dominant share of the tax bill is shifted to the tenant, the tax ratio is heaviest of all.

I do not know of any adequate studies that have been made of assessment conditions in Mississippi. But the foregoing analyses are merely samples of a condition which is known to exist in practically every state in the nation. It undoubtedly does exist in this state, and accounts in large measure for the excessive burdens on homes and farm property that have found expression in the popular movement for homestead tax exemption. It is a situation that demands some kind of remedial measures, but only after a most careful diagnosis, that the remedy itself may not develop to be worse than the disease.

TABLE VIII.

PERCENTAGE OF THE NET INCOME BEFORE TAXES TAKEN IN PROPERTY TAXES FOR CERTAIN ENTERPRISES IN THE STATE IN 1927

Type of business	Percentage of net income before taxes taken in property taxes*
Class I railroads	25.2
Electric light and power companies	16.3
State banks	23.6
National banks	12.5
Rented farms	28.9
Rented city property	29.5

*Such taxes as are paid in lieu of the general property tax are included.

In conclusion, it should be emphasized that the homestead exemption movement is not merely a movement to increase home ownership but is a movement which involves two other problems, either of which is more important than homestead tax exemption, and each of which is entirely distinct from the other. In the first place, it strikes at the very foundations of the whole system of property taxation, and in the second place, it calls for scrutiny of a composite of factors, each in addition to home taxation, which stand as a barrier to the ownership of homes.

The answer to neither of these problems is to be found in superficial or self-evident remedies, but in remedies commensurate with the problems themselves. To this end, a complete examination should be made of the whole system of property taxation in the state, to find out what kind of inequalities exist, where they exist, and why they exist—and the results laid open to public scrutiny, so that it can intelligently apply such measures as may correct the situation from the ground up.[55] The people of Missis-

[54] *Id.* at 220.
[55] *Cf.* Conclusion to May, *op. cit. supra* note 2, at 137.

sippi feel that the state is entering an era of social and economic development of the first order. But it will never be able to take full advantage of its opportunities with a broken down property tax system bolstered up by a patch-work of expedients or panaceas.

One fundamental principle should never be lost from view in any of the ramifications of our thinking along tax lines. That is that all taxes—whether they be property taxes, business taxes, license taxes, liquor taxes, sales taxes or other kinds of taxes—are, in the final analysis, income taxes in the sense that they are all taken in some way from income. The important point is whether they will be taken in such manner as to recognize differences in the size of incomes, and hence differences in tax-paying ability, or taken without regard to either of these factors. Differences in income or tax paying power, may be recognized either through taxes on income *per se*, or through property taxation actually assessed according to true value, since such value is merely another way of expressing income. There are often places for license taxes, liquor taxes, and sales taxes, but always for reasons other than ability to pay.[56]

The second major problem involved in homestead ownership consists, as has been indicated, of a composite of factors, the solution of several of which may probably be of greater significance to home ownership than tax exemption. With respect to homestead exemption itself, since it has been accepted by the state as a tentative part of its public policy, it should be given adequate opportunity to determine its relative potency in reducing tenancy.

To this end, a thorough survey should be made, touching not only the motives and incentives of all those who buy homesteads, but also the transfers of purchasing power both between groups of persons and between individuals, until there is ample evidence to prove or disprove its value. But in the meantime, another comprehensive survey should be made to find out what the other factors are that stand in the way of home ownership in this state, and also to ascertain the proper remedies to be applied. A thorough-going solution of these major problems may hold the answer not only to the more immediate problem in question, that of home ownership, but to many other problems of statewide concern.

[56] *Cf.* Hinckley and Haggerty, *op. cit. supra* note 41, at 546, 553-54.

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STATE BAR SECTION

BAR COMMENTS

[*This subdivision of the State Bar Section is inaugurated for the purpose of providing members of the Mississippi State Bar a forum for a short concise discussion of legal problems. Submission of material by state attorneys is invited. Requirements are that the manuscript be no more than 1500 words in length, and that it deal with a current legal question.*]

Investment of Estates of Veterans' Beneficiaries in Mississippi

*Gibson B. Witherspoon**

Like most states, Mississippi has adopted the Uniform Veterans' Guardianship Act.[1] Section 12 of this Act, found in Section 7346 of the Mississippi Code of 1930, provides for the investment of guardianship funds "as allowed by law or approved by the court." Section 1885 of the Mississippi Code of 1930, relating to guardians generally, provides that a guardian, with the consent of the chancery court, may invest any surplus money of his ward "in the bonds of the state or of any county, or municipality thereof, or of a levee board, or of the United States." The Mississippi Supreme Court, in the case of *Carlisle v. Love*,[2] has construed this Section to mean that even with the approval of the chancellor, the guardian can invest the ward's funds *only* in bonds of the state, county, municipality, levee board, or United States, and not in the stocks or bonds of any commercial organization. There are other cases holding that investments in stocks or bonds other than those above set out are unauthorized.[3]

Under the statute, does the construction placed on Section 1885 apply to Section 7346, thereby limiting guardians of veterans from investing in bonds other than state, county, municipality, levee boards, and United States? The Veterans' Bureau has taken the position that these decisions will apply also in the construction of Section 7346, and that the phrase "or approved by the court" does not enlarge a guardian's authority to invest in other stocks and bonds.

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*Member Mississippi and Lauderdale County Bars, Meridian, Miss.

[1] 9 U. L. A. 412. List of states adopting this Act found on page 412.

[2] 170 Miss. 621, 155 So. 197 (1934).

[3] *In re* Guardianship of Horne, 178 Miss. 714, 173 So. 660 (1937) (life insurance policy); Carlisle v. Love, 170 Miss. 621, 155 So. 197 (1934) (stock in bank). A careful reading of the whole of Miss. Code Ann. (1930) § 1885 suggests that the legislature may quite possibly have included the reference to bonds of governmental agencies as an addition to the discretion of the chancellor and not as a limitation upon it. The construction of this Section is too well established, now, however, to be questioned.

To reach the conclusion urged by the Veterans' Bureau, it is necessary to change the meaning of the disjunctive "or" into that of the conjuctive "and". That a court has authority so to read a statute must be admitted; and there are several cases where a reading of a statute has shown that a change in meaning was required in order to reach and enforce the legislative intent.[4] But a strained interpretation of this nature is adopted by the court only when the context of the statute obviously requires it, or in order to avoid an absurd or unreasonable result, or to carry out the evident intention of the legislature.[5]

In this statute there is no such urgent reason to require a change from "or" to "and". As it reads, the statute is quite reasonable, and there is no indication that the legislature intended other than to allow the investment whenever it complied either with the provisions of Section 1885, or with such requirements as the chancellor might impose.

Nor need the interpretation here urged cause alarm because of fear of squandering or wasting the guardian's estate. The safeguards are many. Everyone should be willing to admit that there are some commercial stocks and bonds which are safe, and which would compare favorably with bonds of governmental agencies. The investments would no doubt be recommended by attorneys representing the guardians. And it is submitted that the attorneys wish to do that which will benefit the estate most.

But even in those exceptional cases where the selfish interests of attorneys may be questioned, there would still be the supervision and discretion of the chancellors, to whom a petition to invest would have to be addressed and approved before any investment is made.[6]

And, finally, in Veterans' cases, there is the added safeguard of the Veterans' Administration, since the law specifically provides that this Administration be furnished certified copies of the petition to invest thirty days before it is presented.[7]

This position is urged all the more confidently because it is the one adopted in those other states where the question of the interpretation of this same Section of the Uniform Veterans' Act has arisen.[8]

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[4]Warren County v. Booth, 81 Miss. 267, 32 So. 1000 (1902) ("and" read for "or"); Adams County v. Catholic Diocese of Natchez, 110 Miss. 890, 71 So. 17 (1916) ("or" read for "and").

[5]Georgia Paper Stock Co. v. State Tax Board, 174 Ga. 816, 164 S. E. 197 (1916); State v. Gillis, 75 Miss. 331, 24 So. 25 (1898); McInnis v. State, 97 Miss. 280, 52 So. 634 (1910); BLACK, INTERPRETATION OF LAWS (2d ed. 1911) § 75; 2 SUTHERLAND, STATUTORY CONSTRUCTION (Lewis ed. 1904) § 397.

[6]MISS. CODE ANN. (1930) § 1885.

[7]Miss. Gen. Laws (1935) c. 43.

[8]Hines v. Mills, 187 Ark. 465, 60 S. W. (2d) 181 (1933) (corporate stock); Branch v. Veterans' Administration, 189 Ark. 662, 74 S. W. (2d) 800 (1934)

Attention may here be called to Section 19 of the Act,[9] which provides that "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." It is the writer's opinion that the courts of Mississippi, when this question is presented for decision, will follow the view already established in the other states, since the Supreme Court of Mississippi seeks to construe uniform acts so as to conform to the construction placed thereon by other states.[10]

Report of Executive Committee of Junior Bar Section

The Executive Committee of the Junior Bar Section of the Mississippi State Bar Association has adopted for its activities during the present fiscal year the following matters:

In accordance with the resolutions adopted at the last meeting of the Section, the committee headed by George M. Ethridge is studying the proposal of the establishment of a State Bureau of Criminal Identification and Investigation, and is cooperating with the committee of the Junior Chamber of Commerce of the state in this connection. The committee has met and is actively pressing this matter.

The Section feels that it can be of service to those admitted to the bar either by graduation at the University of Mississippi or by examination. Therefore, a committee has been appointed, with James N. Ogden and Edwin White as Chairmen, for the purpose of personally contacting every new lawyer and aiding him in beginning the practice. The committee will also get in touch with the law students at the University of Mississippi and the Jackson School of Law, in order to show the interest of the young lawyers in those who are planning to practice law.

The committee is actively engaged in a comprehensive survey of the statutes of Mississippi in an attempt to find inaccuracies, omissions and conflicts therein, and to make suggestions for the correction of same. This committee is headed by Ed Brunini as general chairman and Paul B. Montjoy and Jack H. Ewing as regional chairmen.

The desirability of recommending the adoption of the new Federal Court rules of practice in Mississippi and any other changes in our present practices and procedure is being considered by a committee of which Semmes Luckett is chairman. A number of valuable suggestions have already been made in this connection.

(real estate); *In re* Parker, 168 Tenn. 327, 77 S. W. (2d) 816 (1935) (endowment insurance).

[9] 9 U. L. A. 417; Miss. Code Ann. (1930) § 7353.

[10] "It is highly important that the decisions of all courts construing the Uniform Negotiable Instruments Act be harmonious, and to conform to decisions of other states passing upon this phase of the law requires the chancellor's judgment be affirmed." Taylor v. Ross, 129 Miss. 536, 543, 92 So. 637, 638 (1922).

The Section has also established a legislative drafting committee to aid members of the legislature in drafting proposed acts with the special purpose of assisting in preventing duplications, inaccuracies and omissions through the amendment of existing statutes and the enactment of new statutes. This committee will be available to the legislature at all of its regular and special sessions.

In accordance with a resolution adopted at the last meeting, a committee headed by Charles Sisson is considering the desirability of having any changes with reference to the selection of the Judiciary in Mississippi.

A legislative committee has also been appointed to assist in obtaining legislation for the purpose of carrying out any projects which the Junior Bar Section decides to carry through. This committee is headed by Billy Bacon.

The committees of the Junior Section for this year are as follows:

COMMITTEES JUNIOR BAR SECTION OF THE MISSISSIPPI STATE BAR

County Court

Chas. A. Sisson, Chairman
Hugh N. Clayton

Legislative Drafting

J. Morgan Stevens, Chairman
Marcellus Green
H. V. Watkins, Jr.
W. Calvin Wells, Jr.
Guy Mitchell, Jr.
Robert Burns

Judicial Selection

Charles A. Sisson, Chairman
Maxwell Brammette
L. Glenn Fant
David Cottrell, Jr.
J. R. Lobrano

Bureau of Identification

George M. Ethridge, Chairman
Robert Hauberg
J. Gordon Roach
Howard McDonnell
Charles Gordon
Floyd W. Cunningham
Jamie Whitten
Breed O. Mounger
Berry Brown
David Cottrell, Jr.

Cooperation with Young Lawyers

James N. Ogden, Chairman "A"
R. L. Dent
Hermon Adams
Thos. H. Watkins
Maurice Black

Edwin White, Chairman "B"
John W. Wade
Kermit Cofer
N. W. Overstreet
Eugene Thompson

Changes in Laws, Omissions, Etc.

Edmund L. Brunini, Chairman "B"
Fred Berger
Gibson Witherspoon
Junior O'Mara
Leonard Nelson

Paul D. Montjoy, Chairman "B"
Earl T. Thomas
John W. Wade
Charles Tindall
Thomas Caldwell

Jack H. Ewing, Chairman "C"
Tom P. Brady
Thos. H. Wiltz
Carroll Gartin
Breed O. Mounger

Pleading, Practice & Procedure

Semmes Luckett, Chairman
Frank E. Everett
William C. Keady
Robert L. Smallwood
Karl Weil
Kearney Travis
Jesse Graham

Legislative Committee

Wm. A. Bacon, Chairman
Wm. A. Strong, Jr.
Jesse Graham
Ben Guider
James T. Kendall
Robert Burns
W. A. Hewitt
John H. Holloman
G. Garland Lyell, Jr.
Joe Hopkins

Admissions to Bar

(Sub-Commitee of Exec. Comm.)
James N. Ogden, Chairman
Charles Sisson
Frank E. Everett
John W. Wade
Robert Hauberg
John C. Satterfield

Memorial to Hon. A. T. Stovall

At a meeting of Mississippi State Bar, held at Meridian, Mississippi, pursuant to an invitation from Hon. Gabe Jacobson, a past president of Mississippi State Bar Association, all past presidents were his guests at a breakfast at the Lamar Hotel.

As a result of this very delightful gathering with their gracious host, a fraternal and purely social organization of the past presidents was formed. It was decided that at each succeeding annual meeting of Mississippi State Bar Association a get-together breakfast would be held.

Our beloved and esteemed friend, Hon. A. T. Stovall, of Okolona and Columbus, Mississippi, was present, and added much to the happiness and pleasure of all gathered around the breakfast table. Since then, he has passed on, and those of us who remain are here gathered in the second meeting of the Association of the Past Presidents, and desire to give expression to our affectionate regard and profound respect for our dear friend, and to express our regret that we have not the pleasure of his delightful company on this occasion.

Mr. Stovall came of a distinguished family of Chickasaw County, Mississippi. He was the son of Capt. W. G. Stovall, an honored and leading citizen of our state, long prominent and useful in its political life.

Mr. Stovall was educated at the Virginia Military Institute and the University of Mississippi, and entered upon the practice of his profession at Okolona, Mississippi. In 1895 he formed a partnership with his friend and classmate, Hon. C. B. Williams, now rendering distinguished service as circuit court judge in St. Louis, Missouri. Mr. Stovall soon achieved a leading and commanding position as an attorney in his section of the state; and, by his gracious manner, his high character, and striking personal magnetism made thousands of friends throughout the entire state.

In 1923, Mr. Stovall became the president of the Columbus & Greenville Railway Company, and, from that time until his death, handled in a most admirable fashion the affairs of that railroad.

Mr. Stovall took a deep interest in the Mississippi State Bar and American Bar Associations. Unless unavoidably prevented, by circumstances over which he had no control, he always attended the annual meetings of both Associations. He served with Mr. Chief Justice Hughes of the United States Supreme Court, on the Executive Committee of American Bar Association.

Mr. Stovall was a man of high character, devoted to his friends, courteous and kindly in all his transactions and dealings with everyone, and faithful and capable in the discharge of all his duties as a citizen, lawyer and man. He contributed greatly to the success of the Mississippi State Bar; and, in every meeting that he attended, his gracious presence was a source of great satisfaction and pleasure to all. We shall miss him greatly. We believe that he fulfilled, through a long and useful life, the fine aspirations so beautifully expressed by George Eliot in these words:

"May I reach
That purest heaven—be to other souls
The cup of strength in some great agony,
Enkindle generous ardor, feed pure love,
Beget the smiles that have no cruelty,
Be the sweet presence of a good diffused,
And in diffusion ever more intense!
So shall I join the choir invisible
Whose music is the gladness of the world."

News Items

At the thirty-third meeting of the Mississippi State Bar at Vicksburg, on June 10, 1938, there was brought into existence the University of Mississippi Law School Alumni Association. At this meeting Hindman Doxey was elected president; Robert Thompson, vice-president; and Buck Newman, secretary-treasurer. The declaration of purpose of this Association, adopted at this meeting, has been mailed out to all members of the Association, and reads as follows: "To keep alive memories of experiences in our law school and give substance and continuity to its traditions; to permit each alumnus to find out who his fellow alumni are and what they are doing in the world of work; and to nurture and maintain our loyalty to the institution and our interest in its welfare, present and future."

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Since the annual meeting of the Mississippi State Bar the Board of Commissioners has held three business meetings on July

1st, September 9th and November 18th, the September meeting being held in Vicksburg. All meetings were well-attended and the commissioners report that there has been much constructive activity in each of the districts. The fourth, eleventh, sixteenth and seventeenth districts have perfected permanent district associations and several others are in the process of organization.

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On November 5th the members of the Fourth District met in Greenwood and officers for the new year were elected. Ben Wilkes of Greenville was chosen president; P. W. Allen of Indianola, vice-president; and Mrs. Zelma W. Price of Greenville, secretary. These officers succeed Elbert Johnson of Indianola, Ben Wilkes of Greenville and Alfred Stoner of Greenwood, respectively. R. M. Kelly of Vicksburg, President of the State Bar, was present on this occasion and delivered an inspiring address. Other notables present were Congressman W. M. Whittington and Chancellor R. E. Jackson of Cleveland, each of whom brought helpful messages to the association.

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A permanent organization of the lawyers of the Eleventh District was perfected at a meeting held at the Clarksdale Country Club on Saturday night, December 10th, over which meeting Dugas Shands, Commissioner for the district, presided. There were approximately fifty members present. W. W. Venable of Clarksdale was elected president, Chancellor R. E. Jackson of Cleveland, vice-president, and Eugene Thompson of Marks, secretary-treasurer. Some weeks prior to this meeting the Junior Bar members of the district had organized and elected Semmes Luckett of Clarksdale president. They presented the program for the December 10th meeting, which consisted of discussion of the new Federal rules of procedure. Those on the program included Dugas Shands of Cleveland, William Clay Roberts of Rosedale, Eugene Thompson of Marks, J. W. Bell of Tunica, Charles Sisson, W. H. Maynard, Jr., P. D. Holcomb and Lester Sack of Clarksdale. The association plans to have several meetings during the coming year, and it is anticipated that a large delegation from the district will attend the lectures to be held at the University on January 13th.

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The Forrest County Bar recently held a meeting at which Judge Sidney Mize was the guest speaker. The program was given entirely to the discussion of the Federal rules of procedure. A similar meeting was held in Leflore County. The Hinds County Bar holds monthly meetings in the form of legal clinics where subjects of vital importance to the lawyers are considered.

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At the first meeting of the commissioners, Ben H. McFarland

of Aberdeen was chosen to serve as Complaint Commissioner for the State Bar for the ensuing year.

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Committees to serve during 1938-39 which have been appointed by President R. M. Kelly are as follows: Finance, David E. Crawley, Chairman, W. Lee Guice and F. D. Hewitt; Memorial, Marion W. Reily, Chairman, W. H. Watkins, Sr., and O. H. Barnett, Jr.; Law Journal, Hugh N. Clayton, Chairman, Dugas Shands and T. C. Kimbrough; Public Relations, W. Lee Guice, Chairman, Alexander Currie and J. H. Caldwell, Sr.; To cooperate with Harrison Company of Atlanta in publication of Supplement Code, H. H. Creekmore, Chairman, Forrest Jackson and P. H. Eager, Jr.; Salaries of Instructors of University Law School, Harry M. Bryan, Chairman, M. V. B. Miller and E. G. Truly; Legislation, R. M. Kelly, Chairman, J. A. Cunningham, J. H. Culkin, Marion W. Reily, A. A. Cohn, E. L. Dent and Bidwell Adam; American Law Institute, Judge Sidney Smith, Chairman, M. S. McNeill, F. E. Everett, W. W. Venable and Judge Ben Stevens; State Court Procedure to conform to new Federal Rules of Procedure, Judge Sidney Mize, Justice Virgil Griffith, Marion W. Reily, W. E. Gore and C. L. Garnett.

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The next meeting of the commission will be given entirely to planning the program for the next annual meeting of the association.

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At the November meeting of the commission the secretary was instructed to have printed in pamphlet form and distributed to each member of the Mississippi State Bar the Rules of Professional Conduct, the By-Laws of the Mississippi State Bar, and the Unified Bar Act, and in addition to this distribution to have published in this issue of the Law Journal the Rules of Professional Conduct. These rules follow:

Rules of Professional Conduct of the State Bar of Mississippi

These rules shall be cited or referred to as "Rules of Professional Conduct of the State Bar of Mississippi."

The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1.—The Duty of the Lawyers to the Courts:

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of

the judicial office but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

All pleadings, papers and briefs filed by attorneys should be deferential to the Court and opposing counsel. The Court's dealings with litigants, court officers and lawyers should likewise be in keeping with a wise and helpful decorum commensurate with the occasion.

2.—The Selection of Judges:

It is the duty of the Bar to protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those who are willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office, and not by a desire for the distinction the position may bring to themselves.

3.—Attempts to Exert Personal Influence on the Court:

Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge a special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the judge's station, is the only proper foundation for cordial, personal and official relations between Bench and Bar.

4.—When Counsel for an Indigent Prisoner:

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5.—The Defense or Prosecution of Those Accused of Crime:

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise, innocent persons, victims only of

suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6.—Adverse Influences and Conflicting Interests:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connected with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. A lawyer should never represent conflicting interests, save when peculiar circumstances make it imperative.

The obligation to represent the client with undivided fidelity and not divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7.—Professional Colleagues and Conflicts of Opinion:

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right and duty of any lawyer, without fear or favor, to give proper advice to those

seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8.—Advising Upon Merits of a Client's Cause:

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment the client should be advised to avoid or to end litigation.

9.—Negotiations With Opposite Party:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; he should never undertake to negotiate or compromise the matter with him but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10.—Acquiring Interest in Litigation:

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting; provided, however, that he may take security for his fees thereon in good faith.

11.—Dealing With Trust Property:

Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with his private property or be used by him.

12.—Fixing the Amount of the Fee:

In fixing fees, lawyers should avoid charges which over-estimate their advice and service, as well as those which under-value them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the

cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client.

No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13.—Contingent Fees:

Contingent fees, being sanctioned by law, are recognized as proper.

14.—Suing a Client for a Fee:

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and, lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15.—How Far a Lawyer May Go In Support of a Client's Cause:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

The lawyer owes "Entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and to the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty.

In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great

trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16.—Restraining Clients From Improperties:

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

17.—Ill-Feeling and Personalities Between Advocates:

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18.—Treatment of Witnesses and Litigants:

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19.—Appearance of Lawyer as Witness for His Client:

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20.—Newspaper Discussion of Pending Litigation:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional

to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

21.—Punctuality and Expedition:

It is the duty of the lawyer not only to his client, but also to the courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22.—Candor and Fairness:

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel or the language of a decision or a text-book; or with the knowledge of its invalidity to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proven, or in those jurisdictions, where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side intends to reply.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23.—Attitude Toward Jury:

All attempts to curry favor with the juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24.—Right of Lawyer to Control the Incidents of the Trial:

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposing lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatives, and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal or that he do anything therein repugnant to his own sense of honor and propriety.

25.—Taking Technical Advantage of Opposite Counsel: Agreements With Him:

A lawyer should not ignore known customs or practice of the Bar of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court. A lawyer should scrupulously live up to all agreements, oral or otherwise, made with opposing counsel.

26.—Professional Advocacy Other Than Before Courts:

A lawyer openly, and in his true character may render professional services before legislative or other bodies regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorney-ship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27.—Advertising, Direct or Indirect:

The most worthy and effective advertisement possible, even for a young lawyer and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations is unprofessional. It is equally unprofessional to procure business by indirections through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering re-

tainers in exchange for executor-ships or trustee-ships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28.—Stirring Up Litigation, Directly or Through Agents:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick, the injured, the ignorant or others, to seek his professional services.

A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred. "Ambulance chasing" is condemned.

29.—Upholding the Honor of the Profession:

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30.—Justifiable and Unjustifiable Litigations:

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or

to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion of his honor that in his opinion his client's case is one proper for judicial determination.

31.—Responsibility For Litigation:

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defense, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32.—The Lawyer's Duty in its Last Analysis:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles or moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

33.—Partnerships—Names:

Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. Certain Courts require that lawyers practicing before them shall appear individually and not as members of partnerships. In the formation of partnerships care should be taken not to violate any law locally applicable; and where partnerships are formed and permitted between lawyers who are not admitted to practice in the

local courts, care should be taken also to avoid any misleading name or representation which would create a false impression as to professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted who is not a member of the legal profession, duly authorized to practice, and amenable to professional discipline. No person should be held as a practitioner or member who is not so admitted. In the selection and use of a firm name, one not admitted to practice in the local courts should not be named, lest such use of his name should mislead as to his professional position or privileges. And no false or assumed or trade name should be used to disguise the practitioner or his partnership. The continued use of the name of a deceased or former partner is or may be permissible by local custom, but care should be taken that no imposition or deception is practiced through this use. If a member of the firm becomes a judge, his name should not be continued in the firm name, as it naturally creates the impression that an improper relation or influence is continued or possessed by the firm.

Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law.

34.—Division of Fees:

No division of fees for legal service is proper, except with another lawyer, based upon a division of service or responsibility. But the established custom of sharing commissions at a commonly accepted rate, upon collections of commercial claims between forwarder and receiver though one be a lawyer and the other not (being compensation for valuable services rendered by each), is not condemned hereby, where it is not prohibited by statute.

35.—Intermediaries:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

The established custom of receiving commercial collections through lay agency is not condemned hereby. But it is not proper to solicit collections either directly or indirectly through lay agents.

36.—Retirement From Judicial Position or Public Employment:

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

37.—Confidences of a Client:

The duty to preserve his client's confidence outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened. And, if by reason of his association with another lawyer, he gains knowledge of misconduct on the part of the other lawyer, it is his duty to transmit such knowledge to the State Bar.

38.—Compensation, Commissions and Rebates:

A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

39.—Newspapers:

A lawyer may with propriety write articles for publication in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

40.—Discovery of Imposition and Deception:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the Court a party,

he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

41.—Expenses:

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

42.—Professional Card:

The simple professional card may with propriety contain only a statement of his name (and those of his lawyer associates), profession, address, telephone number, and special branch of the profession practiced. The insertion of such card in reputable law lists is not condemned and it may there give references or names of clients for whom the lawyer is counsel with their permission.

43.—Withdrawal From Employment as Attorney or Counsel:

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is justified. Upon withdrawal from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

44.—These rules are applicable to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

45.—Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.

NOTES

Torts—Mississippi Comparative Negligence Statute in Automobile Cases

The statute under consideration is Section 511 of the Mississippi Code of 1930, and provides as follows:

> "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

Similar statutes of other states differ materially from the Mississippi act and limit recovery to cases where the negligence of the plaintiff is less than that of defendant.[1] Our statute makes no such distinction and allows recovery even though the plaintiff is grossly negligent.[2] It is the purpose of the present discussion to deal with the application of the statute to automobile cases.

Procedure

If the defendant wishes to rely on the statute, he must plead it specially and request an instruction authorizing the jury to diminish the damages awarded.[3] Before the passage of the act, contributory negligence, being a complete bar to recovery, was properly required to be pleaded specially.[4] At common law, matter going merely in mitigation of damages was admissible under

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[1]The Nebraska statute provides: ". . . . the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison . . . ." Neb. Comp. Stats. (1929) § 20-1151. Somewhat similar is the Wisconsin provision: "Contributory negligence shall not bar recovery . . . . if such negligence was not as great as the negligence of the person against whom recovery is sought . . . ." Wis. Stats. (1937) § 331.045. The Wisconsin act seems broader than the Nebraska statute in that the former allows recovery if plaintiff's negligence is "not as great" as defendant's even though the defendant's may not be "gross in comparison". See Gregory, Legislative Loss Distribution in Negligence Actions (1936) c. 8, p. 61.

[2]Yazoo & M. V. Ry. v. Williams, 114 Miss. 236, 74 So. 835 (1917).

[3]Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459 (1915); M. & O. R. R. v. Campbell, 114 Miss. 803, 75 So. 554 (1917); Yazoo & M. V. Ry. v. Lucken, 137 Miss. 572, 102 So. 393 (1925); Gulf & S. I. Ry. v. Saucier, 139 Miss. 497, 104 So. 180 (1925); Morrell Packing Co. v. Branning, 155 Miss. 326, 124 So. 356 (1929) (although both parties allege other's negligence to be sole cause, the court may give instructions on the comparative negligence statute).

[4]There was a decided division among the states, in the absence of procedural statutes, as to whether contributory negligence was required to be specially pleaded. Clark, Code Pleading (1928) 425.

a plea of the general issue,[5] and could not be pleaded specially.[6] Under the statute comparative negligence operates only to reduce the damages recoverable and thus might well have been treated as any other matter of mitigation.[7] Justification for such a conclusion may be found both in precedent and policy. In Mississippi, although the nature of the defense has been changed, the manner of pleading it is substantially the same.

It has been held that the plaintiff is entitled to an instruction that his own negligence should not operate as a bar to recovery.[8] In the case of *Graves v. Johnson*[9] defendant requested no instructions as to the effect of plaintiff's negligence. However, plaintiff requested and was granted an instruction substantially to the effect that the jury should find for the plaintiff even though they believed him guilty of contributory negligence. The next instruction directed the jury to return *full* damages in the event they should find for the plaintiff. In commenting on the instructions the court said:

> "Appellees have replied that in several cases this court has held and it has so held as a general proposition that if the defendant desire a diminution of damages for contributory negligence, he must obtain an instruction to that effect else he cannot complain. But how can it be that a plaintiff may himself specifically invite and procure the violation of a plain statute, and then hold on to the fruits

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[5]"Matter going in mitigation of damages merely should be given in evidence under the general issue, for by that plea the defendant puts upon the plaintiff not only the proof of his injury but its extent." Grayson v. Brooks, 64 Miss. 410, 1 So. 482 (1887); 15 AM. JUR., 764, § 324.

[6]McCORMICK, DAMAGES (1935) p. 43.

[7]In actions under the Federal Employer's Liability Act, from which nearly all comparative negligence statutes are taken, the Supreme Court of the United States, and the Supreme Court of Idaho have held that contributory negligence going only in reduction of damages need not be specially pleaded and evidence thereof is admissible under the general issue. Kansas City So. Ry. v. Jones, 241 U. S. 181, 36 Sup. Ct. 513, 60 L. Ed. 943 (1916); Rogers v. Davis, 39 Idaho 209, 228 P. 330 (1924). For a discussion of the result under code provisions similar to the Mississippi statute requiring notice of affirmative defenses see: McCORMICK, DAMAGES (1935) c. 2, § 12.

[8]Ill. Cent. R. R. v. Archer, 113 Miss. 158, 74 So. 135 (1917); Morrell Packing Co. v. Branning, 155 Miss. 326, 124 So. 356 (1929) *semble*; Crosby Lbr. & Mfg. Co. v. Durham, 179 So. 285 (Miss. 1938). Where instructions granted defendant supplemented plaintiff's instructions, and taken together a correct statement of the applicable law was given, it was held not error to grant an instruction to plaintiff that his own negligence should not bar recovery: Gulf & S. I. Ry. v. Simmons, 150 Miss. 506, 117 So. 345 (1928).

In Friedman v. Allen, 152 Miss. 377, 118 So. 828 (1928) the trial court instructed the jury that they could diminish the damages of the plaintiff in proportion to his negligence regardless of whether such negligence contributed to the injury, another instruction stated: "the amount of damages, if any awarded to the plaintiff must be diminished in proportion to his own negligence which contributed to the accident." While the first instruction standing alone was manifestly incorrect, the court held the defect to be cured by the second.

[9]179 Miss. 465, 176 So. 256 (1937).

> thereof? We think that if any one of the cases cited by appellee be directly in point and capable of supporting the contention of appellees in the state of the instructions now before us, such a case should be reconsidered as to whether it has gone too far, and while expressing no opinion beyond what has tentatively been stated, we call attention to the matter that the parties and the court may have it before them for consideration on a new trial."

The rule that comparative negligence must be specially pleaded operates harshly against defendants in many cases. Almost invariably plaintiff counsel contend in closing arguments that such a plea operates as a tacit admission of liability and an effort to reduce the amount of plaintiff's recovery. The rigorous requirement was relaxed somewhat in *Chapman v. Powers*[10] where plaintiff appealed complaining that the damages awarded were inadequate. The court held that even though the comparative negligence statute was not pleaded the jury might have considered the plaintiff's fault in assessing damages and such assessment would not be disturbed. This doctrine was reiterated and strengthened in *Goodman v. Lang*,[11] the court saying:

> "While the proceedings and instructions did not refer to the statute on contributory negligence, still the jury had a right to consider the question of contributory negligence and to diminish damages in proportion to the negligence of the plaintiff to the defendant . . . . still the jury is presumed to have a knowledge of law and in the present case must have applied it."

As a result of the doctrine of these two cases many defending pleaders have refrained from mentioning the issue of contributory negligence in drawing pleadings and instructions. Under such procedure some measure of the statute's protection is retained while "confession" of liability is avoided. It seems clear that such a method gives only limited aid and the real purpose of the statute fails. Since the statute is required to be specially pleaded if the defendant desires to invoke it to diminish damages, some measure of restraint should limit the plaintiff's argumentative comment as to its effect. A defense which in its essential operation goes only in reduction of damages should not possess the outward attributes of confession and avoidance.

Right of Recovery

The automobile cases have consistently applied the view that contributory negligence shall not bar recovery but shall merely re-

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[10]150 Miss. 687, 116 So. 609 (1928).

[11]158 Miss. 204, 130 So. 50 (1930). In commenting on this case in (1932) 17 CORN. L. Q. 604, 642 it is said: ". . . . the Mississippi court endows its juries with a knowledge of the law."

duce the paintiff's damages.[12] In *Pascagoula St. Ry. v. McEachern*[13] the plaintiff was driving without regard to where he was going. His companion called attention to a street car and plaintiff turned into a ditch to avoid a broadside collision. Defendant demurred on the ground that plaintiff was guilty of contributory negligence proximately contributing to his injury. On appeal by defendant from judgment overruling the demurrer the court held that although the plaintiff was clearly guilty of contributory negligence, nevertheless, he was entitled to recover in the event that negligence on the part of defendant's motorman also contributed to the injury.

In *Yazoo & M. V. Ry. v. Williams*[14] plaintiff failed to watch for the approach of a train he knew to be near. The jury returned a verdict for the plaintiff and defendant appealed. The court reversed the judgment and held the damages excessive, saying:

> ". . . . the appellee contributed to his injury by his own negligence which would bar recovery here, if it were not for our concurrent negligence statute which comes to his rescue and saves him from defeat."

In *McWhorter v. Draughn*[15] defendant stretched a chain across the highway and plaintiff drove into it. The lower court granted a peremptory instruction for defendant and plaintiff appealed. The court held that the fact that the chain was *obvious* to the traveller would amount only to contributory negligence, and that such fact would not relieve the defendant of negligence in obstructing the road.

In *Frazier v. Hull*[16] plaintiff had stopped at night to repair a flat tire and had no tail light. Defendant was driving without proper brakes and ran into the back of plaintiff's car. The trial court granted an instruction that the plaintiff's failure to have a tail light was the sole proximate cause of the accident. On appeal the court held that the failure to have a tail light would bar recovery only if it were the sole proximate cause; if it were merely a contributing cause it would only diminish damages. Furthermore, the jury could not have found that the negligence of the plain-

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[12]Pascagoula St. Ry. v. McEachern, 109 Miss. 380, 69 So. 85 (1915); Yazoo & M. V. Ry. v. Williams, 114 Miss. 236, 74 So. 835 (1917) (plaintiff grossly negligent); Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921); McWhorter v. Draughn, 134 Miss. 246, 98 So. 597 (1924); Snyder v. Campbell, 145 Miss. 287, 110 So. 678 (1928); Columbus & G. Ry. v. Buford, 150 Miss. 832, 116 So. 817 (1928); Friedman v. Allen, 152 Miss. 377, 118 So. 828 (1928); Standard Oil Co. of Ky. v. Evans, 154 Miss. 475, 122 So. 735 (1929); Frazier v. Hull, 157 Miss. 303, 127 So. 775 (1930); Wheat v. Wheat, 162 Miss. 95, 139 So. 849 (1932); Ala. & V. Ry. v. Graham, 171 Miss. 695, 157 So. 241 (1934).

[13]109 Miss. 380, 69 So. 85 (1915).

[14]114 Miss. 236, 74 So. 835 (1917).

[15]134 Miss. 246, 98 So. 597 (1924); *cf.* Graves v. Hamilton, 184 So. 56 (Miss. 1938).

[16]157 Miss. 303, 127 So. 775 (1930).

tiff was the sole cause of the injury, since the defendant would have seen plaintiff's car in time to stop had defendant's car been equipped with proper lights.

It is not necessary that the negligence of the defendant be the sole proximate cause. It is sufficient to render him liable if his negligence concurs with one or more causes in producing the injury.[17] Such a statement upon examination must be accepted as correct. It is evident that in a true comparative negligence case the negligence of the defendant cannot be the sole cause. If the negligence of the plaintiff is actually a contributing factor, it certainly contributes causally.

An interesting case where the negligence of a driver was held to bar recovery is *Thompson v. Miss. Cent. R. Co.*,[18] where plaintiff's decedent was killed in a crossing collision. The court gave an instruction to the effect that plaintiff could not recover if deceased saw the train in time to stop and yet proceeded across the track; this, irrespective of failure on the defendant's part to give the required signals. The jury found for the defendant and plaintiff appealed. The court affirmed the judgment and held that it was immaterial that a required warning was not given if the knowledge which the warning would have given was obtained within sufficient time by the other party.

> "But it is argued that this effort of the deceased driver was contributory negligence merely. The enactment of the statute abolishing contributory negligence . . . . was a just and timely advance in our laws, but unfortunately it has given rise to some confusion in judicial decisions and much more in the arguments advanced in negligence cases. But this confusion would disappear if there was always held firmly in the mind the distinction between the right, on the one hand to maintain the action, and the amount of damages on the other. In order to establish the right to maintain the action the burden is on the plaintiff to show that there was a negligent act or omission, and that this negligence was a proximate cause of the injury, ... whereas in regard to contributory negligence the burden of proof is on the defendant and does not come into play at all unless the plaintiff has on his part sustained the burden as to proximate cause. And since . . . . there was no causal connection between the failure to give the signals and the subsequent injury, and therefore no proximate cause shown as against the defendant, either

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[17]Magers v. Okolona, Houston & Calhoun City Ry., 174 Miss. 860, 165 So. 416 (1936) (plaintiff grossly negligent in running into gondola car partially obstructing rr. crossing).

[18]175 Miss. 547, 166 So. 353 (1936); *cf.* Davis v. Elzey, 126 Miss. 789, 80 So. 630 (1921); G. & S. I. Ry. v. Simmons, 150 Miss. 506, 117 So. 345 (1928); New Orleans & N. E. Ry. v. Hegwood, 155 Miss. 104, 124 So. 66 (1929).

> solely or by way of contribution, all arguments in respect of contributory negligence on the part of the plaintiff disappear as having no legal pertinency. . . ."

Despite intimations in other cases,[19] the *Thompson* case seems the only one pertinent to the present discussion, where the court has denied recovery by the application of usual causation formulas.[20]

In *Alabama & V. R. R. v. Graham*[21] defendant was negligent in failing to provide curb boards of sufficient height on its bridge. Plaintiff's husband negligently attempted to pass a car on the bridge and crashed through the rail. The trial resulted in judgment for the plaintiff and defendant appealed. The principal contention made was that the only duty on defendant was to use due care to make the bridge reasonably safe for persons exercising ordinary care for their own safety. The court affirmed the judgment for plaintiff and said:

> "That the measure of a railroad company's duty in the maintenance of its crossings and bridges and of a municipality's duty in maintaining its streets is to use ordinary care to keep them in a reasonably safe condition for persons exercising ordinary care and prudence was held in (citing cases) . . . . , but it does not necessarily follow that there can be no liability to a person who was not exercising due care. It is true that if the appellant companies have discharged their duty to keep the bridge in such condition as to render it reasonably safe for persons using

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[19]Notably Hammond v. Morris, 156 Miss. 802, 126 So. 906 (1930), where the court said: ". . . . they (jury) could infer that the injury was due to his own negligence *without negligence* on the part of the defendant."

[20]RESTATEMENT, TORTS (1934) § 432, (1), comment (b): "The statement in this subsection is most frequently, although not exclusively, applicable where the actor's conduct consists of a failure to take some precautions which are required for the protection of another person's land or chattel. In such case, if the same harm, both in character and extent, would have been sustained even had the actor taken the required precautions; his failure to do so is not even a perceptible factor in bringing it about and cannot be a substantial factor in producing it." In Solomon v. Continental Baking Co., 172 Miss. 388, 160 So. 732 (1935) plaintiff ran into defendant's parked truck, which had no tail light. The court granted a peremptory instruction for the defendant and plaintiff appealed. Held: "We will assume, but merely for the purpose of argument that the appellant's driver approached the car of the defendant without observing pertinent laws of the road. Nevertheless such negligence did not supersede the prior negligence of appellee's driver, First, it does not appear from the evidence that this negligence of the appellant's driver was of such a character that the collision would have resulted therefrom even if the truck had been equipped with a red rear light. Second, where an act of negligence is a substantial factor in bringing about an injury, it does not cease to be a legal and proximate cause thereof because of the intervention of a subsequent act of negligence of another which contributed to the injury, if the prior act of negligence is still operating and the injury inflicted is not different from that which would have resulted from the prior act. One of the purposes of the statute requiring an automobile to be equipped with a rear red light is to prevent collisions of this character. . . ."

[21]171 Miss. 695, 157 So. 241 (1934).

ordinary care, there can be no legal liability to anyone, but if they negligently failed to discharge their duty in this regard, and their failure to do so contributed to the injury and death of deceased, a recovery is not barred by reason of the negligence of the driver of the car."[22]

Guests

The negligence of the driver is held not to be imputable to a guest unless there exists some relationship between them which gives the occupant control over the actions of the driver.[23] The guest is to be charged only with his own negligence in failing to protest or to take reasonable precautions for his own safety. The leading case is *Yazoo & M. V. R. R. v. Lucken*[24] where an occupant attempted to leap from the car when he saw a train approaching the crossing and realized the danger:

"However the negligence of the driver is not imputable to the guest or occupant of the automobile unless the driver is the agent or servant of the person riding in the automobile. A person riding with another should not

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[22]The duty imposed is stated to be "to use ordinary care to keep them in a reasonably safe condition for those using ordinary care." This duty is the same as the duty of a municipality in maintaining its streets and sidewalks. In a note on the tort liability of a municipality in (1938) 10 MISS. L. J. 175, 176, it is said in commenting on this duty. "This on first notice seems to be contradictory to Mississippi's Comparative Negligence Statute . . . . Upon consideration, however, we find that this is not true. This statute comes into operation only when it has been determined that the defendant is guilty of negligence. When this is found the statute prevents the contributory negligence of the plaintiff from acting as a complete bar to recovery. In the rule outlined above, however, the phrase 'for those using due or ordinary care' is a direct limitation on the *degree of care* required of the defendant city. It is a factor in determining whether or not the defendant has *breached its duty.* If the street is reasonably safe for those using due care, or if the city has used reasonable care to make it so, no party injured as a proximate result thereof can recover. However, if the street is not reasonably safe for those using due care . . . . a party injured as a proximate result of its condition, may recover. At this point the comparative negligence statute may operate to reduce the amount of damages awarded." *Cf.* Graves v. Hamilton, 184 So. 56 (Miss. 1938).

[23]Coccora v. Vicksburg Light and Traction Co., 126 Miss. 713, 89 So. 257 (1921); Yazoo & M. V. Ry. v. Lucken, 137 Miss. 572, 102 So. 393 (1925); Moore v. Johnson, 148 Miss. 827, 114 So. 734 (1927) (deceased riding as guest in car operated with defective brakes in drizzling rain); Columbus & G. Ry. v. Lee, 149 Miss. 543, 115 So. 782 (1928); Columbus & G. Ry. v. Buford, 150 Miss. 832, 116 So. 817 (1928); Columbus & G. Ry. v. Fondren, 154 Miss. 40, 121 So. 838 (1929); Yazoo & M. V. Ry. v. Beasley, 158 Miss. 370, 130 So. 499 (1930); Terry v. Smylie, 161 Miss. 31, 133 So. 662 (1931) (brothers on joint pleasure mission); Weyen v. Weyen, 165 Miss. 257, 139 So. 608 (1932); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Greer v. Pierce, 167 Miss. 65, 147 So. 303 (1933) (driver and occupant held fellow servants); Thomas v. Lexington, 168 Miss. 107, 150 So. 816 (1933); Miss. Cent. Ry. v. Roberts, 173 Miss. 487, 160 So. 604 (1935) (children killed in school bus at RR. crossing); Flynn v. Kurn, 184 So. 160 (Miss. 1938).

[24]137 Miss. 572, 102 So. 393 (1925).

> close his eyes to manifest danger, or fail to give warning of any danger which becomes apparent to him."

In *Weyen v. Weyen*[25] the plaintiff was riding as a guest and her husband instructed the driver to speed up. A peremptory instruction was given the plaintiff in the lower court. In reversing the case the supreme court held that whether the requirement of reasonable care called for the plaintiff to protest under the circumstances was a question for the jury. While a protest reasonably made might be heeded in many cases, it would seem that occasion might arise when the more prudent course would be to remain silent. Aggravation of danger might conceivably occur as a result of irritating or distracting the driver by an ill-timed remonstrance.[26]

When the guest is riding with a driver whom he reasonably believes to be safe, vigilance may be relaxed and the guest is not required to be on the lookout for unsuspected danger. The guest may rely on the driver to discharge his duty until it becomes apparent that the driver will not do so.[27]

In *Chapman v. Powers*[28] the plaintiff entered the car of her husband with knowledge that he was intoxicated, and the car struck defendant's unmarked gravel pile. The jury returned a verdict for the plaintiff and she appealed claiming that the damages were inadequate. The court held that the jury might properly have found her guilty of contributory negligence and said:

> "If it is manifest that the host, from drunkenness, ... is unfit to drive the car, ... and the guest is aware of that condition of affairs, and voluntarily rides in the car with

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[25]165 Miss. 257, 139 So. 608 (1932).

[26]See: (1930) 78 PA. L. REV. 736, 742; (1930) 64 U. S. L. REV. 57, 58 (1930).

[27]Yazoo & M. V. Ry. v. Lucken, Columbus & G. Ry. v. Lee, Columbus & G. Ry. v. Buford, Columbus & G. Ry. v. Fondren, all cited *supra* note 23. In Columbus and G. Ry. v. Buford and Columbus & G. Ry. v. Lee, both cited *supra* note 23, two cases arising out of the same collision, the court used apparently conflicting language. The first case held that the guest was under no duty to protest until it became apparent to him that a train was approaching, and the second holding that the guest should have protested at the driver's failure to stop, look and listen. Both cases announce the same definitive principles and differ in applying them. The variance may be explained by the fact that the credibility of the driver, who was the chief witness for plaintiff in both cases, was pointedly attacked in the second case. Under the holding of Columbus & G. Ry. v. Fondren, *supra*, the question of when the protest must be made would vary according to the facts of each case. *Cf.* Yazoo & M. V. R. R. v. Beasley, 158 Miss. 370, 130 So. 499 (1930).

[28]150 Miss. 687, 116 So. 609 (1928). In Haynes-Walker Lumber Co. v. Hankins, 141 Miss. 55, 105 So. 858 (1925), an instruction that defendant must show that driver was so reckless as to put deceased on notice was held correct in view of an instruction for defendant that if guest knew of driver's negligence it was his duty not to ride with him.

such a host, the negligence of the latter becomes the negligence of the guest."[29]

In *McLaurin v. McLaurin Furniture Co.*[30] plaintiff was riding with her husband and the automobile lights went out. The wife requested the driver to stop a passing car and follow behind its lights, but he refused. The husband proceeded and ran into a ditch. In an action by the wife against her husband's employer (owner of the car), the court held that the wife could not be charged with the negligence of her husband. Furthermore, in view of the isolated character of the highway she had no reasonable alternative other than to continue to ride with him.

In *Gower v. Strain*[31] plaintiff was a passenger in the car of defendant physician. The plaintiff was aware of the fact that defendant had slept only about three and one-half hours the preceding night. There was testimony tending to show that defendant had opened his window several times to overcome drowsiness. Defendant fell asleep and drove off an embankment. The trial court directed a verdict for the defendant and plaintiff appealed. The defendant contended that plaintiff should have known defendant had had insufficient sleep and therefore she assumed the risk incident to his driving. In reversing the case the court held that there was nothing to charge the plaintiff with notice that the defendant had not had enough sleep, especially since he was a physician who necessarily often was deprived of rest. The decision is also based to some extent on the fact that plaintiff's position in the rumble seat gave her no view of irregularities in defendant's conduct. The position of the plaintiff in the car and with respect to the driver is usually a factor in determining whether the conduct of plaintiff was reasonably careful.[32] In any event the peremptory instruction for defendant would appear incorrect, since plaintiff's fault would constitute at most only contributory negligence which would not bar recovery.

A situation where the danger would have been apparent to the guest had she not had her eyes closed arose in *Sternberg Dredging Co. v. Screws.*[33] Resting momentarily with eyes shut, the plaintiff was not aware of the impending accident, and thus had no knowledge giving her an opportunity to protest. The lower court granted an instruction for the plaintiff that it was not negligence for her to close her eyes under the circumstances. On appeal by defendant the judgment was affirmed. The court held that the expression

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[29]150 Miss. 687, 694, 116 So. 609, 611 (1928). Although the language of the court is inexact, it is clear that the wife is charged only with her own negligence, and not that of her husband.

[30]166 Miss. 180, 146 So. 877 (1933).

[31]169 Miss. 344, 145 So. 244 (1933).

[32]See Columbus & G. Ry. v. Fondren, 154 Miss. 40, 59, 121 So. 838, 841 (1929).

[33]175 Miss. 383, 166 So. 754 (1936).

"the guest should not close his eyes to manifest danger",[34] does not mean that he may not close his eyes under any circumstances, and further it is not negligence to fail to look out for unsuspected dangers.

Rights of Beneficiaries

A class of cases somewhat similar to those involving the application of guest law are the beneficiary cases.[35] The usual case is where one beneficiary is driving and his negligence concurs with that of the defendant in causing the death of decedent. The decisions are uniform in holding that the negligence of one beneficiary does not affect the rights of others, and that his recovery is not to be diminished in proportion to his negligence. Such a conclusion is logically sound since the actions are based on the wrongful death statute, Section 510, Mississippi Code of 1930. The rights invoked are derivative and based on a cause of action which the deceased himself would have had.

Amount of Recovery

The contributory negligence statute has been criticised on the ground that its practical effect is to eliminate all consideration of plaintiff's fault. Under the statute plaintiff's negligence is no longer a bar to recovery; it may be doubted whether the fault of plaintiff even reduces the amount of his recovery in the majority of verdicts. One material benefit of the statute is the tendency of the court to affirm the jury's assessment of damages, when the sum awarded is small. Also, before the passage of the statute, sympathetic juries, when instructed that contributory negligence would preclude recovery, often returned a finding of no contributory negligence, and this despite strong evidence to the contrary.

In view of the large number of cases involving contributory negligence generally, there seem comparatively few where it can be said with any degree of certainty that the jury has actually reduced plaintiff's damages.[36] But where it is manifest that the jury has failed to consider plaintiff's negligence, the court may either

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[34]Yazoo & M. V. Ry. v. Lucken, 137 Miss. 572, 102 So. 393 (1925).

[35]Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920); Nosser v. Nosser, 137 So. 491, 166 Miss. 636 (1931).

[36]Yazoo & M. V. Ry. v. Williams, 114 Miss. 236, 74 So. 835 (1917) (plaintiff guilty of gross negligence; $10,000 verdict reduced by half); Gulf & S. I. Ry. v. Boone, 120 Miss. 632, 82 So. 335 (1919) (verdict for $30,000 reduced one-third); Tallahalla Lbr. Co. v. Holliman, 125 Miss. 308, 87 So. 661 (1921) (plaintiff injured while mounting moving train, damages awarded $18,000, *remittitur* of $5500); Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926) (trespasser's damages of $10,000 reduced by half). In Terry v. Smylie, 161 Miss. 31, 133 So. 662 (1931) $2500 was held not excessive for possible permanent injuries. Where there was no showing that the guest for whose death the action was brought failed to remonstrate at driver's negligence, a verdict for $10,000 was not excessive. Yazoo & M. V. Ry. v. Beasley, 158 Miss. 370, 130 So. 499 (1930).

order a *remittitur* and affirm, or may reverse and remand the case.[37]

If the jury clearly appears to have actually considered plaintiff's fault in assessing damages, the verdict is rarely disturbed. In *Pounders v. Day*[38] plaintiff's injuries were extremely serious. The jury returned damages of $400 and plaintiff appealed complaining of the inadequacy of the verdict. The court agreed with plaintiff that $400 was not compensation for his injuries, but held that the jury might have applied the statute and diminished plaintiff's damages in proportion to what they conceived to be his negligence. Only one case has been found where the court on appeal sustained plaintiff's contention that the damages were inadequate.[39]

The bases of jury verdicts are, of course, not available from reported decisions. However, the tendency of the jury seems to be to return large sums as damages without accurate apportionment as to relative negligence. But it also appears that where the jury has actually considered plaintiff's fault, the reduction has been substantial. From a review of the decisions it would seem that in most cases where the court has ordered a *remittitur*, the damages might well have been regarded as excessive even were contributory negligence not involved. Surveys in jurisdictions having similar statutes indicate that the number of recoveries has been extended with little diminishment of damages.[40] A similar conclusion as to the effect of the Mississippi Statute would appear to have reasonable grounds.

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[37]Yazoo & M. V. Ry. v. Williams, 114 Miss. 236, 74 So. 835 (1917). There seem to be few cases where it appears manifest to the court that the jury has not considered plaintiff's negligence.

[38]151 Miss. 436, 118 So. 298 (1928). In Tendall v. Davis, 129 Miss. 30, 91 So. 701 (1922), the court held $178 not inadequate in view of plaintiff's gross negligence. Where plaintiff's truck was damaged to the extent of $1750, a verdict of $850 was held not inadequate in view of plaintiff's negligence. Gulf M. & N. Ry. v. Seymour, 148 Miss. 461, 114 So. 35 (1927). In Haynes-Walker Lbr. Co. v. Hankins, 141 Miss. 55, 105 So. 858 (1925), the court held the jury could diminish damages without being instructed and a verdict of $2500 was not inadequate for death. In Chapman v. Powers, 150 Miss. 687, 116 So. 609 (1928), $500 was held not inadequate for severe injuries, including scalp lacerations, fractures, bruises and loss of weight. In Goodman v. Lang, 158 Miss. 204, 130 So. 50 (1930) the plaintiff lost several teeth, suffered a broken jawbone, lost several weeks from work and incurred heavy dental expenses, a verdict for $250 was held not inadequate.

[39]Huff v. Bear Creek Mill. Co., 116 Miss. 509, 77 So. 306 (1918). Plaintiff in this case was repairing machinery and was killed, a verdict for $50.00 was held inadequate, the court saying that the jury could not reasonably have found that the negligence of the deceased contributed to such a large extent.

[40]See (1936) 50 HARV. L. REV. 153: "Personal injuries are not susceptible of exact measurement in terms of money, and a jury actually influenced by extra-legal considerations can almost as easily say that a $6000 verdict represents fifty per cent of a negligent plaintiff's total injury as that it represents one hundred per cent, if it is for any reason felt that he ought to recover more than $3,000."

RECENT DECISIONS

BURGLARY—MEANING OF "DWELLING-HOUSE"—HOUSE FROM WHICH OWNER HAS MOVED LEAVING GOODS WHICH HE INTENDS TO GET NEXT DAY.

Defendant was indicted for burglary under Miss. Code Ann. (1930) Section 812 for breaking and entering, and taking goods from a house from which the occupants had removed the day before. They had left the goods with the intention of returning on the next day to get them. HELD: The evidence was fatally variant with the indictment charging that defendant broke and entered a "dwelling-house". *Haynes v. State*, 180 Miss. 291, 177 So. 360 (1937).

For a man to be guilty of burglary at common law, he must have broken and entered the dwelling house, or mansion-house of another at night[1] with intent to commit a felony, whether the felonious intent was carried out or not.[2] All outhouses within the "curtilage" were protected since they were held to be parts of parcel of the dwelling-house.[3] The "curtilage" was defined to be the open space situated within a common inclosure belonging to the dwelling house.[4]

The term "dwelling-house" has been held to include an apartment,[5] room in a hotel,[6] building, or cluster of bulidings in which a man resides with his family,[7] or as any permanent building in which he may live.[8] The mere sleeping in a house has been held not sufficient to constitute it a dwelling,[9] and the fact that the owner causes a servant to sleep every night in a house in which he never intends to reside, his object being to protect the furniture, does not make it a dwelling house.[10]

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[1]Fuller v. State, 48 Ala. 273 (1872); Commonwealth v. Buzzell, 16 Pick. 153 (Mass. 1866); State v. Clark, 89 Mo. 423, 1 S. W. 332 (1866); State v. Baker, 70 P. (2d) 733 (Utah 1937).

[2]9 C. J. 1022 No. 3; State v. Ward, 147 La. 1083, 86 So. 552 (1920); State v. Wiley, 194 Atl. 629 (Md. 1937); State v. Puckett, 95 S. C. 114, 78 S. E. 737 (1913).

[3]Hutchings v. State, 3 Ga. App. 300, 59 S. E. 848 (1907); See (1934) 11 TEX. L. REV. 116 (Texas statute declares that all buildings may be subject to burglary and fails to designate specifically the various types. It has uniformly been held under this burglary statute that "house" has a broad signification and comprehensive meaning. In construing the statute the court has held the following to be a "house": each room of a house; an ordinary smokehouse; a buggy shed, entrance to which could be gained only by tearing boards from a partition; a part of a room; and a stock room).

[4]4 BL. COMM. 294; 4 R. C. L. 426 § 16.

[5]State v. Foster, 129 N. C. 704, 40 S. E. 209 (1901); Thomas v. State, 95 Tex. Crim. Rep. 133, 252 S. W. 1062 (1923).

[6]People v. Carr, 255 Ill. 203, 99 N. E. 357 (1912); Ullman v. State, 1 Tex. App. 220 (1876); see Simpson v. State, 5 Okla. Cr. 57, 113 Pac. 549 (1911); State v. Burton, 27 Wash. 528, 67 Pac. 1097 (1902); State v. Johnson, 4 Wash. 593, 30 Pac. 672 (1892).

[7]Smith v. State, 80 Fla. 315, 85 So. 911 (1920).

[8]Gibbs v. State, 8 Ga. App. 107, 68 S. E. 742 (1910).

[9]Scott v. State, 62 Miss. 781 (1885). See *Ex parte* Vincent, 26 Ala. 145 (1855); State v. Warren, 33 Me. 30 (1877).

[10]1 RUSSELL, CRIMES (5th ed. 1877) 803. See State v. Weber, 156 Mo. 257, 56 S. W. 893 (1900).

The problem of whether the house must be actually occupied at the time has caused considerable difficulty.[11] Thus it has been held that where a man owns two homes, and lives in them alternately, the breach of one of them, in the absence of his family, is burglary.[12] But there are numerous holdings to the effect that a dwelling house must be permanently occupied, and the fact that the owner visits and stays for a few weeks at a time once or twice a year will not constitute such building a dwelling house.[13]

A mere temporary absence by the owner of a house will certainly not prevent the house from being a dwelling.[14] But the cases agree that the owner must have quitted the house *animus revertendi* for a home to remain a dwelling house.[15] If the owner locks up the house and leaves it with a settled purpose not to return, the house ceases to be a dwelling house in the sense necessary to make an unlawful breaking a burglary.[16] The *animus revertendi* is, of course, a question of fact to be submitted to the jury.[17] In the instant case the court felt that the evidence of a lack of intent to return was so strong that there was nothing to go to the jury. But it would appear that the real question was whether the owner had ever completely "left" the house, not whether he intended to return to it. In the analogous situation of change of domicile in Conflict of Laws, it is held that the old domicile would be lost as soon as a new one had been acquired.[18] But a different result could easily be reached here; during the period of removing from one home to another, both houses might properly be called dwellings.[19]

In a case most similar to the one at hand,[20] Kentucky held that this would constitute a burglary of a dwelling house. But Kentucky also provides for all contingencies by holding that no matter what the character of the house, or whether the crime be committed in the daytime or at night, it nevertheless constitutes burglary.[21]

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[11]Davidson v. State, 86 Tex. Crim. Rep. 243, 216 S. W. 624 (1919); Hopkins v. State, 61 Tex. Crim. Rep. 590, 135 S. W. 553 (1911); *cf.* Mason v. State, 27 Ohio Cir. Ct. 526 (1905).

[12]Schwabacher v. People, 165 Ill. 618, 46 N. E. 809 (1897); Commonwealth v. Brown, 3 Rawle 207 (Pa. 1832); See 2 AMER. & ENG. ENC. LAW 672.

[13]Scott v. State, 62 Miss. 781 (1885).

[14]Olds v. State, 19 Ala. App. 162, 95 So. 780 (1923); People v. Allard, 99 Cal. App. 591, 279 Pac. 182 (1929).

[15]State v. Bair, 112 W. Va. 655, 166 S. E. 369 (1932); see Commonwealth v. Woolfolk, 28 Ky. L. Rep. 114, 89 S. W. 110 (1905).

[16]Henderson v. State, 80 Fla. 491, 86 So. 439 (1920).

[17]Schwabacher v. People, 165 Ill. 618, 46 N. E. 809 (1897).

[18]To the effect that a person can have only one domicile at a time, see Boyd's Ex'r. v. Commonwealth, 149 Ky. 764, 149 S. W. 1022 (1915); Rourke v. Hanchett, 240 Mass. 557, 134 N. E. 355 (1922); Brown v. Brown, 150 Tenn. 89, 261 S. W. 959 (1924); Seibold v. Wahl, 14 Wis. 82, 159 N. W. 546 (1916); RESTATEMENT, CONFLICT OF LAWS (1934) § 11.

[19]Thus many cases involve the problem of assigning a domicile when a man has two homes which might properly be called dwelling houses. See the cases cited *supra* note 18 and compare the Dorrance litigation. *In re* Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932); *In re* Dorrance, 115 N. J. Eq. 268, 170 Atl. 601 (1934). See also RESTATEMENT, CONFLICT OF LAWS (1934) § 24.

[20]Thomas v. Commonwealth, 150 Ky. 374, 150 S. W. 376 (1912).

[21]In Commonwealth v. Woolfolk, 28 Ky. L. Rep. 114, 89 S. W. 110 (1905) the court said, "The term 'dwelling-house' is therefore one of differentiation, a name which distinguishes it from every other house or class. To

The problem before the court in the instant case, of course, was not one of the abstract definition of "dwelling-house", but of application of a particular statute.[22] Therefore a consideration of the sections[23] adjoining the one under which the indictment was drawn may be helpful.

Section 810 deals with the burglarizing of a house "in which there shall be at the time, some human being", and a conviction under this section involves imprisonment in the penitentiary of not less than seven nor more than fifteen years. Section 811 increases the penalty to a possible twenty-five years when the burglar is armed with a deadly weapon and enters an occupied dwelling. Section 812, under which the indictment in this case was drawn, covers the entering of any "dwelling-house", the penalty being imprisonment for not more than ten years. Section 817 provides for burglary of "any shop, store, booth, tent, warehouse, or other building, ship, steamboat, flatboat, or railroad car in which any goods, merchandise, or valuable thing shall be kept for use, sale, deposit, or transportation . . . . [or] any building within the curtilage of a dwelling house." The penalty is imprisonment for not more than seven years.

The differences in the penalty as expressed in these sections would make it appear that the legislature has sought to impose a heavier penalty as the danger of the burglar's meeting someone in the building increased. The real decision in the case, therefore, was whether the house was more similar to the category of an actually occupied house on the one side or to that of a completely vacant house on the other, insofar as the likelihood of a meeting is concerned. It would be difficult to quarrel with a decision either way.

It may be pointed out, however, that in deciding as it did, the court reversed the decision below,[24] and thus the expense of a new trial was incurred. If the sentence of the court below was less than seven years,[25] it was no heavier than that which could have been imposed had the indictment been brought under Section 817, which includes the burglary of a vacant house.

John B. Farese

CONFLICT OF LAWS—LAW GOVERNING TORT LIABILITY—IS RIGHT TO DIRECT SUIT AGAINST INSURER FOR TORT COMMITTED BY INSURED QUESTION OF SUBSTANCE OR PROCEDURE?

One Reeves had his automobile repaired by New Orleans Packard, Inc., of New Orleans, Louisiana, which negligently left a wrench in the steering apparatus. Due to this negligence, a wreck occurred in Alabama, injuring

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constitute a building or a dwelling house, it is not necessary that it be constantly occupied as a place of residence by a family or person. If constructed for use as a place of residence of a family or person, it is a dwelling house, even in the process of erection, and is known as and called a 'dwelling house.' The same should be true, and is true, of a dwelling house that becomes for a time vacant, after being occupied by a family or person as a place of residence. Having been designed for and used as a dwelling house, it remains a dwelling house, though temporarily unoccupied, until converted to some other use."

[22]MISS. CODE ANN. (1930) § 812.

[23]MISS. CODE ANN. (1930) §§ 810-12, 817.

[24]Haynes v. State, 180 Miss. 291, 177 So. 360 (1937).

[25]The report of the case does not indicate what sentence was imposed upon the defendant.

plaintiff, resident of Mississippi, who was riding as guest of Reeves. Plaintiff brings suit in Mississippi directly against the Globe Indemnity Co., which had insured the garage against any liability arising from its negligence, invoking a Louisiana statute[1] allowing such action without first establishing the tort liability of the insured. Defendant demurs on ground that the Louisiana statute is a procedural one and therefore should not be applied by the Mississippi court.[2] HELD: Demurrer overruled. The transaction is governed in all respects by Louisiana law. *Burkett v. Globe Indemnity Co.*, 181 So. 316 (Miss. 1938).

Here the injury occurred in Alabama, resulting from negligence committed in Louisiana, with action brought in Mississippi. It is clear that the law of Louisiana would control any question concerning the indemnity contract.[3] But before any liability under the contract can be imposed, it is necessary to establish the tort liability of the insured. A serious doubt arises as to whether the liability in tort of the insured should be determined by the Louisiana law. The court appears to adopt as its premise that the law of Louisiana will completely govern the right of the plaintiff to recover. But the general rule in conflict of laws pertaining to tort liability is that the law of the place where the injury occurred (Alabama) governs the substantive rights of the plaintiff.[4] This is so regardless of the law of the forum. Following this general rule in the present case, then the court should look solely to the laws of Alabama in determining the rights of the plaintiff, and was in error in looking to the Louisiana rule.[5]

But there is present an additional feature in this case which might have some bearing on the decision. While the injury did occur in Alabama, the negligence, the legal cause of such injury, was committed in Louisiana. In such a situation, should the law of place of injury control, or the law of place of negligence? Again the view that the law of place of injury governs is generally adopted,[6] and Mississippi seems to have so held in a previous decision on this point.[7]

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[1]La. Laws (1930) Act. No. 55.

[2]Defendant also demurred on ground that the garage was an independent contractor whose work had been accepted by the owner, and therefore there was no liability. Demurrer was overruled as to this ground also.

[3]The contract was entered into in Louisiana, obviously to be performed there. Also no other state had any connection with the transaction.

[4]American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511 (1909); Ocean S. S. Co. v. Peoples Shoe Co., 202 Ala. 594, 81 So. 241 (1919); Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918, 102 N. W. 836 (1904); Hall v. Hamel, 244 Mass. 464, 138 N. E. 925 (1923); Pullman Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897); Western Union Telegraph Co. v. Jennings, 110 Miss. 673, 70 So. 830 (1915); Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1929).

[5]Actually, the court in reaching its decision first examined the Mississippi law to see if there could be any liability, and after ascertaining the Mississippi view, then went on to show that Louisiana authorities were in accord therewith. After adopting the premise of looking to the Louisiana law to determine the rights of the plaintiff, it would seem that the court followed its premise in a rather back-handed manner.

[6]Alabama Great Southern Ry. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092 (1890).

[7]Chicago, St. L. & N. O. Ry. v. Doyle, 60 Miss. 977 (1883).

The next question involved in the case is whether plaintiff can sue the indemnity company directly without first establishing the liability of the garage. Louisiana, by statute,[8] allows this, but the rule in Mississippi is otherwise;[9] and the problem is whether the Louisiana statute should be applied. Courts are in accord that a foreign statute should apply if it is one of substance, but should not be applied by the forum if one of procedure.[10] The difficulty lies in classifying the right created under the statute into a substantive or procedural one.

No exact standard or guide has been set out by the courts for the determination of whether a right is one of substance or procedure, and it might be that a definite, rigid test would be undesirable and result in injustice.[11] Courts say that anything affecting the *right* is substance, and anything affecting the *remedy* is procedure.[12] Obviously such an approach affords no solution to the problem, and really amounts to little more that a restatement thereof.

The court in the instant case holds this statute confers a substantive right and not a procedural one. Looking to the effect of the statute, it would seem more nearly classifiable with those which have been held to be of a procedural nature, since it in no way really concerns the inherent right to recover claimed by the plaintiff, but only designates a party against whom he may proceed directly, when if plaintiff could recover at all, he could also have recovered against that same party before the statute was passed. Generally, statutes dealing only with parties to suits are considered to be procedural.[13]

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[8]See *supra* note 1,

[9]Travelers' Ins. Co. v. Inman, 157 Miss. 810, 126 So. 399 (1930).

[10]Levy v. Steiger, 233 Mass. 600, 124 N. E. 477 (1919); Interstate Life & Accident Co. v. Pannell, 169 Miss. 50, 152 So. 635 (1933); Fitzpatrick v. International Ry., 252 N. Y. 127, 169 N. E. 112 (1929); RESTATEMENT, CONFLICT OF LAWS (1934) § 585.

[11]Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333, 334 proposes the following test to determine whether a given rule of law is to be considered as substance or procedure: "How far can the court go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?" *Cf.* 3 BEALE, CONFLICT OF LAWS (1935) § 584.1: "In each situation the task of the court remains the same; there must be a balancing of the interests of the parties, the court, and the respective states. If the practical convenience to the court in adopting the local rule of law is great, and the effect of so doing upon the rights of the parties is negligible, the law of the forum will be held controlling. If the situation is reversed the rule of the foreign law will be adopted." See STUMBERG, CONFLICT OF LAWS (1937) c. 4.

[12]See cases discussed in 3 BEALE, CONFLICT OF LAWS (1935) c. 12; DICEY, CONFLICT OF LAWS (5th ed. 1932) c. 32; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) c. 5; STUMBERG, CONFLICT OF LAWS (1937) c. 4.

[13]Kansas *ex rel.* Winkle Terra Cotta Co. v. U. S. Fidelity Co., 328 Mo. 295, 40 S. W. (2d) 1050 (1931) (suit in the name of a state); Taft v. Ward, 106 Mass. 518 (1871) (suit against partners without first suing the firm); Howard Undertaking Co. v. Fidelity Life Ass'n., 59 S. W. (2d) 746 (Mo. App. 1933) (assignee of chose of action suing in own name); Levy v. Levy, 78 Pa. St. 507, 21 Am. Rep. 35 (1875) (same); Ruhe v. Buck, 124 Mo. 178, 27 S. W. 412 (1894) (suit by or against married woman in her own name); Robertson v. Queen, 87 Tenn. 445, 11 S. W. 38 (1889) (same); Saunders v. Adams Express Co., 71 N. J. L. 270, 57 Atl. 899 (1904) (whether unincorporated organization is to be sued in the company name or through an officer).

In an early case, Kirkland v. Lowe, Pattison & Co., 33 Miss. 423 (1857)

However, allowing a direct suit as the court did in this case does not appear to have inconvenienced the court in any way or to have interfered with a strong policy of the state. The decision might be considered as a progressive step away from a provincialism to which most courts have bound themselves.

There is present one more question in the case. The court is debating whether a Louisiana statute is substantive or procedural. The Louisiana court has already ruled that this statute is procedural.[14] Should the forum be bound by a state's classification of its own statute into one of substance of procedure? The general view is that the forum decides for itself whether a statute of another state is substantive or procedural without reference to decisions in the state passing the statute on that point.[15] The Mississippi court in the instant case was following this view in classifying the statute as one of substance in the face of the Louisiana classification calling it one of procedure.

L. A. Wyatt

ESTOPPEL TO ASSERT TITLE—EFFECT OF SALE BY GRATUITOUS LICENSEE IN POSSESSION.

A, holder of the legal title of certain premises, granted same to *B*. The deed, however, was invalid because it lacked signature of *A's* wife, the premises being a homestead.[1] The deed was never placed of record. Later *B* reconveyed to *A*, which deed likewise was not recorded. Subsequently *B* conveyed to other parties who apparently had notice that *B* was not the true owner. The premises were finally mortgaged to the defendant bank and the mortgage foreclosed. The complainant, *A*, instituted the present action for the purpose of canceling the deed of trust, and setting up his own title. HELD: Defendant was not entitled to rely on the doctrine of adverse possession,[2] since the mortgagor and his predecessors in title held permissively[3] under the complainant. Nevertheless the complainant could not maintain the action.

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the Mississippi court in ruling on the question of right of assignee of creditor to bring suit in his own name, expressly held that question of who were proper parties to an action is one of procedure and to be determined by the law of the forum. It said: "The rule which applies to the question who shall be parties to the action, is established by the law of the forum, and is said to belong rather to the form of the remedy than to the right and merit of the claim," (p. 431). Accord: Osborn v. First Nat. Bank, 175 Pa. 494, 34 Atl. 858 (1896).

[14]Graham v. American Employer's Ins. Co., 171 So. 471 (La. App. 1937).

[15]3 BEALE, CONFLICT OF LAWS (1935) § 584.2; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 78; RESTATEMENT, CONFLICT OF LAWS (1934) § 584. In McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 PA. L. REV. 933, 937-40, however, it is urged that the decision should be made by the law of the place where the transaction occurred, so that the right may not be altered because of the choice of forum. See also, Cheatham, *Internal Law Distinction in the Conflict of Laws* (1936) 21 CORN. L. Q. 570, 577-79; Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247, 256.

[1]MISS. CODE ANN. (1930) § 1778.

[2]MISS. CODE ANN. (1930) § 2287; Woods v. Campbell, 87 Miss. 782, 40 So. 874 (1906).

[3]Adams v. Guice, 30 Miss. 397 (1855); Rothschild v. Hatch, 54 Miss. 554 (1877); Leavenworth v. Reeves, 106 Miss. 722, 64 So. 660 (1914); Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929); Morgan v. Collins School, 160 Miss. 321, 133 So. 675 (1931); Bullock v. Greer, 179 So. 264 (Miss. 1938).

His acquiescence in the continued possession of *B* and *B's* successors over a long period of time and under circumstances giving them apparent indicia of ownership estopped him from asserting his own claim as owner. *Barron v. Federal Land Bank of N. O.*, ____ Miss. ____, 180 So. 74 (1938).

Odinarily, allowing another to remain in non-adverse possession is not sufficient to constitute an estoppel.[4] However, here: (1) The complainant made no protest, although he had full knowledge that the defendant's predecessors back to *B* were making successive conveyances to each other; (2) He remained silent for seven years allowing the bank's grantor to continue in possession, and he had knowledge of the deed of trust to the bank.

The court said that this amounted to such negligent and wrongful conduct as to bar his right to equitable relief, concluding with this statement: "Equity will not lend its aid to one who is guilty of unconscionable conduct and great laches in asserting rights, where deeds of record indicate title in others."[5]

Laches is an unreasonable and unexplained delay in asserting a right; and such neglect, taken in conjunction with an implied waiver arising from knowledge of existing conditions and acquiescence in them, operates as a bar in a court of equity.[6]

The court in reaching this decision in this case seems to have held in accord with the general rule that if an owner of land knowingly stands by and permits his property to be mortgaged or sold by another, to one who is, to the owner's knowledge, relying on the apparent ownership of the person executing the conveyance, such conduct, irrespective of who benefits by the transaction, will estop the owner from asserting his title against the mortgagee or grantee. In that class of cases it is considered that there is a legal obligation to speak, and that concealment is such fraud as will forfeit the title.[7]

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[4]Webber v. Axtell, 94 Minn. 375, 102 N. W. 915 (1905); Chew v. Calvert, 1 Miss. 54 (1818); Richardson v. Toliver, 71 Miss. 966, 16 So. 213 (1894); Roberts v. Bookout, 162 Miss. 676, 139 So. 175 (1932); Rice v. Bunce, 49 Mo. 231 (1872); Crest v. Jack, 3 Pa. 238, 27 Am. Dec. 353 (1834); Notes (1838) 32 Am. Dec. 213, (1897) 64 Am. St. Rep. 920, (1889) 4 L. R. A. 333, (1830) 21 Am. Dec. 410, (1914) 48 L. R. A. (N. S.) 767.

[5]Barron v. Fed. Land Bank of N. O., 180 So. 74, 77 (Miss. 1938).

[6]Anderson v. Northrop, 30 Fla. 612, 12 So. 318 (1892); Ring v. Lawless, 190 Ill. 520, 60 N. E. 881 (1901); Morse v. Seibold, 147 Ill. 318, 35 N. E. 369 (1893); Troll v. St. Louis, 257 Mo. 626, 168 S. W. 167 (1914); Treadwell v. Clark, 73 App. Div. 473, 77 N. Y. S. 350 (1902); Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592 (1905); Alexander v. Byrd, 85 Va. 690, 8 S. E. 577 (1889).

[7]Lindsay v. Cooper, 94 Ala. 170, 11 So. 325 (1891); Godeffrey v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360 (1852); Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340 (1857); Markham v. O'Conner, 52 Ga. 183 (1874); Scottish-American Mortgage Co. v. Bunckley, 88 Miss. 641, 41 So. 502 (1906); Hafter v. Strange, 65 Miss. 323, 3 So. 190 (1887); Nixon's Heirs v. Carco's Heirs, 28 Miss. 414 (1854); Dickson v. Green, 24 Miss. 612 (1852); Watkins v. Peck, 13 N. H. 360 (1843); Richardson v. Chickering, 41 N. H. 380 (1860); Follett v. Reese, 20 Ohio 546 (1851); Workman v. Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654 (1857); Gaddes v. Pawtucket Inst. for Savings, 33 R. I. 177, 80 Atl. 415 (1911); Henderson v. Overton, 2 Tenn. 394 (1830); Engle v. Burns, 5 Call. (Va.) 463 (1805); Notes (1856) 67 Am. Dec. 221, (1861) 80 Am. Dec. 171, (1887) 7 Am. St. Rep. 662, (1888) 10 Am. St. Rep. 22, (1897) 11 Eng. Rul. Ca. 101.

It is significant of comment that the court did not point out the bank's failure to trace its predecessors' title to the land back to the invalid deed from *A* to *B*, evidently deeming *A's* silence to constitute such laches and negligent conduct as to far outweigh the bank's negligence.

Viola James

TORTS—LIABILITY OF CHARITABLE CORPORATION.

Plaintiff brought suit for the death of her twelve year old son, who was killed by the elevator in a building owned by the defendant. Tenants leasing the building from the defendant used it for office space and business purposes. Defendant specially pled that it was immune from liability because it was a charitable corporation, and all the profit from said building went for the purposes of the charity. HELD: Defendant was not immune from liability for the negligence of its servants in the operation of the building. *Rhodes v. Millsaps College*, 179 Miss. 596, 176 So. 253 (1937).

There is much confusion and apparent conflict among the cases passing on the question of the liability of a charitable corporation for the negligence or other torts of its officers or servants. A careful consideration of the decisions leads to a division of them into two classes: those cases in which the injury was received by a person who, at the time, was a recipient of the benefit of the charity; and those cases in which the injury was inflicted on a stranger.[1]

There are many reasons advanced by the different courts in holding a charitable corporation immune from liability.[2] All of these have been more or less strongly disapproved, the respective judges adopting a theory satisfactory to themselves, while holding the others unsatisfactory.

The majority of the jurisdictions adhere to the rule that a person who receives an injury from acts of a servant of a charitable corporation, at the time when he is accepting the benefits of the charity, cannot recover for such injury, providing the corporation used due care in selecting its servants.[3]

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[1]In extreme cases some courts have gone so far as to say that the relation of the injured person to the charity does not make any difference in the decision of the case. This is on the ground that in organized society the rights of the individual must be subordinated to the public good. Vermillion v. Due West Woman's College, 104 S. C. 197, 88 S. E. 649 (1916).

[2]Grounds of immunity: (1) public policy; (2) that their funds are held in trust, the division of which the courts will not permit, because it might result in the destruction of the charity or it is beyond the power of the trustees to divert them directly, and therefore they cannot do so indirectly; (3) charities are agencies of the government and therefore entitled to the government's immunity from suit; (4) one accepting charity impliedly assents to hold the giver immune from liability for the acts of servants; (5) the doctrine of *respondeat superior* does not apply to charities; and (6) the employees of the charity are independent contractors, and not the servants of the charity.

[3]Burdell v. St. Lukes' Hospital, 37 Cal. App. 310, 173 Pac. 1008 (1918); Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991 (1916); McDonald v. Mass. General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (1876); James v. Y. & M. V. R. R., 152 Miss. 775, 121 So. 819 (1929); Eastman, Gardiner & Co. v. Permenter, 111 Miss. 813, 72 So. 234 (1916); Miss. Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930). Here, where the injury was caused by the negligence of the staff doctor the right of action is against him instead of the hospital. Adams v. University Hospital, 122 Mo. 675, 99 S. W. 453

This rule has been subjected to much criticism.[4]

In cases of charitable hospitals it is generally held that there is no distinction between the liability toward a charity patient and a pay patient. This is upon the theory that the pay patient does not pay for any particular service but rather that he contributes in proportion to his means toward the conduct of its charity and that he is to receive the same character of service as every other patient in the hospital.[5] This rule has been repudiated, however, in a few American jurisdictions on the theory that a patient who is willing to pay and does pay can recover, inasmuch as there was a contract for taking proper care of the patient, accompanied by a consideration.[6]

As for the second division of the charitable corporation cases, the law has come to be that as to those who are not recipients of the institution's charity, the rule of responsibility for the negligence of its servants and agents is applied as in the case of the ordinary business corporation.[7] Accordingly, it is usually held that a charitable corporation is liable for the negligence of its servants for the unsafe condition of the premises where an injury is inflicted on a stranger.

Considering the facts in the instant decision, they certainly are no more favorable to the defendant than the situation considered above under the second division. Here again the injured plaintiff is a stranger to the charity. Furthermore, the defendant is, at the time of the injury, engaged in a business which affects its charitable operation only indirectly. All jurisdictions concur in saying that in such a case the charitable corporation is not free from liability for negligence. This is true, although the proceeds are applied wholly to its charitable purposes.[8]

(1907); Duncan v. Neb. Sanitarium and Benevolent Assn., 92 Neb. 161, 137 N. W. 1120 (1912); Cunningham v. Sheltering Arms, 115 N. Y. Supp. 576, 153 App. Div. 178 (1908); Vermillion v. Woman's College, 104 S. C. 197, 88 S. E. 649 (1916); Morrison v. Henke, 165 Wis. 166, 160 N. W. 173 (1916).

[4]Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); Basbo v. Salvation Army, 35 R. I. 22 (1912). It is difficult to see why a charitable corporation should be held liable for negligence in the selection of its agents, and not liable for agents carefully selected. Certainly, liability for negligence in the selection of servants may impair the integrity of the trust estate as much as liability for the negligence of servants, though, of course, not so frequently.

[5]Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991 (1905); Duncan v. Neb. Sanitarium and Benevolent Assn., 92 Neb. 162, 137 N. W. 1120 (1912); Gable Sisters of St. Francis, 228 Pa. 514, 75 Atl. 1087 (1910). Notes (1910) 139 Am. St. Rep. 893, (1907) 7 L. R. A. (N. S.) 483.

[6]Tucker v. Mobile Infirmary Assn., 191 Ala. 572, 68 So. 4 (1915); Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887 (1918); Medical College v. Rushing, 1 Ga. App. 475, 57 S. E. 1083 (1907).

[7]Marble v. Nicholas Senn Hospital Assn., 102 Neb. 343, 167 N. W. 208 (1918); Gallon v. House of Good Shepherd, 158 Mich. 361 (1909); Bruce v. Central Methodist Church, 147 Mich. 230, 110 N. W. 951 (1907); McInerny v. St. Lukes' Hospital Assn., 122 Minn. 10, 141 N. W. 837 (1913); Basbo v. Salvation Army, 35 R. I. 22 (1912). Note (1894) 23 L. R. A. 200. 2 RESTATEMENT, TRUSTS (1935) § 403.

The general holding is that the liability in case of an injury to a servant is the same as in the case of a stranger. Hewett v. Woman's Hospital Assn., 73 N. H. 556, 64 Atl. 190 (1906); Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); Armendarez v. Hotel Dieu, 145 S. W. 1030 (Tex. 1912).

[8]Holder v. Mass. Horticultural Soc., 211 Mass. 370, 97 N. E. 630 (1912); Nims v. Mount Hermon Boys' School, 160 Mass. 177, 35 N. E. 776 (1893); Mc-

It is the opinion of a small minority that the rule of immunity from liability of charitable corporations under any circumstance is unjust, anti-social and unsuited to modern conditions, and that it should be abandoned.[9] They seem to think that the rule is merely a "hand-down" from Old English law and has no place in our Americanized legal concepts. The charity of times gone by was a very different thing from the modern charity. Today, charity has become organized. Formerly, it depended upon humane instincts of individuals or small informal groups. The modern charity is a thing of boards and committees, of card indices and filing systems and of rules and regulations. It is the ultimate purpose of these institutions that the individual should be bettered in mind, body and estate by what it does for him. If the institution, through negligent injury to the individual, prevents the fulfilment of these objects, it has defeated the purpose for which it was created, and has failed in its duty to the members of society who have established it. The result is that its economic value is reduced.

The question now in the minds of those attempting to change the rule is how can this change be brought about? It is conceded that it cannot be accomplished by decisions, because of the innate conservatism of the courts, or because of the force of the principle of "stare decisis." There is left only one way. It could be made the subject of legislation.

Francis S. Bowling

Kay v. Morgan Memorial Co-operative Industries and Stores, Inc., 272 Mass. 121, 172 N. E. 68 (1930); Foley v. Wesson Memorial Hospital, 245 Mass. 363, 141 N. E. 113 (1923); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S. W. 510 (1918).

[9]Mulliner v. Evangelischer Diakonniessenverein *etc.*, 144 Minn. 392, 175 N. W. 699 (1920).

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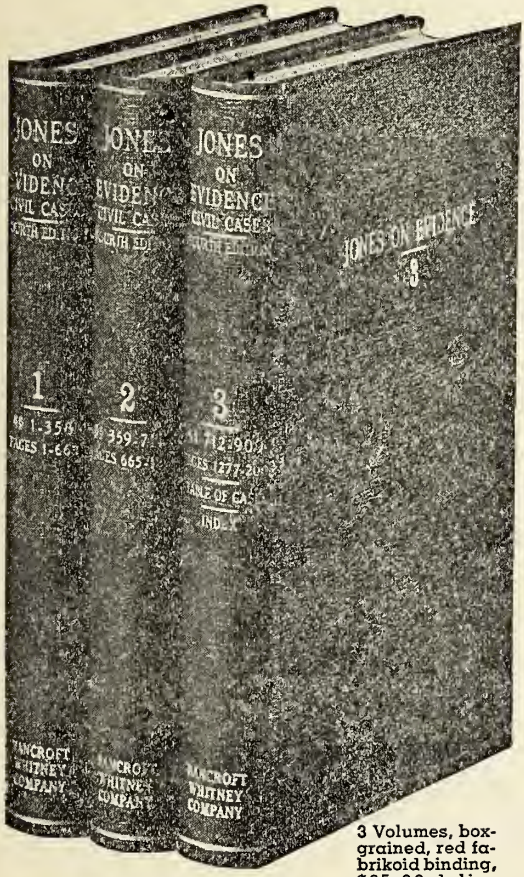

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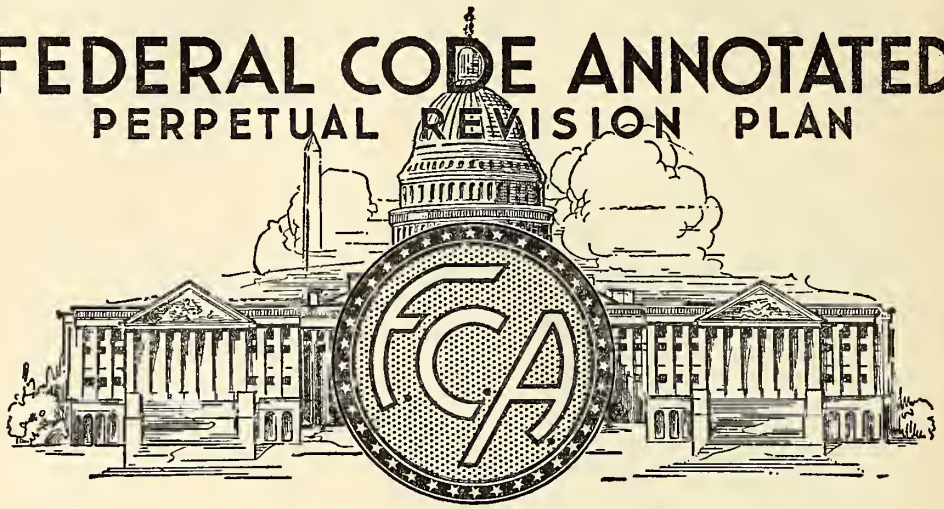

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